No. 89-1923

Supreme Court, U.S.
FILED
JUN 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

RODNEY D. HENDRICK,

Petitioner,

versus

H.E. AVENT, ET AL., AN UNINCORPORATED ASSOCIATION, H.E. AVENT, MARK S. AVENT, BRANTLEY T. BURNETT, W.J. KINNEY, JAMES A. FINK, JR., DEBORAH W. FINK, AND JOHN C. LINDSAY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Does the Fifth Circuit's decision create a new rule of *res judicata* in bankruptcy that conflicts with the rule generally applied by this Court, by allowing a bankruptcy court's order authorizing the sale of a debtor's stock to preclude a subsequent independent action for fraud by the debtor against the buyers and others, where the debtor's claims arising out of the fraudulent sale did not even accrue until after the bankruptcy court authorized the sale, the debtor did not have a fair opportunity to litigate his claims, and the bankruptcy court expressly reserved the debtor's right to bring the subsequent action?

(2) Does the Fifth Circuit's interpretation of Federal Rule of Civil Procedure 60(a) directly conflict with that of other Circuits and impermissibly limit relief under the Rule, by permitting a judgment to be altered only when a "mechanical" error has been made, even though the Rule itself contains no such limitation, and even though other Circuits have interpreted the Rule to permit correction of all errors that do not reflect the court's true intent?

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The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 891 F.2d 583 (5th Cir. 1990), and is reprinted in the Appendix commencing at App. 1. The opinion of the United States District Court for the Middle District of Louisiana is reported at 96 B.R. 620 (M.D. La. 1989), and is reprinted in the Appendix commencing at App. 18.

JURISDICTION

This Petition for a Writ of Certiorari seeks review of a judgment of the United States Court of Appeals for the Fifth Circuit on January 11, 1990, affirming a summary judgment issued by the United States District Court for the Middle District of Louisiana. On March 9, 1990, the Court of Appeal denied panel and en banc rehearing. This Petition was filed within ninety days thereafter. Jurisdiction to review the judgment of the Court of Appeal is conferred on this Court by 28 U.S.C. § 1254(1).

The constitutional provisions, treaties, statutes, ordinances, and regulations involved in this case are cited in the Table of Authorities and reprinted in the body of the Petition or in the Appendix commencing at App. 83.

I. STATEMENT OF THE CASE

The petitioner, a Louisiana resident, brought this action on February 12, 1986, in the United States District Court for the Middle District of Louisiana against the

defendants, all South Carolina or North Carolina residents. The suit alleges violations of The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, the Securities Exchange Act of 1934, 15 U.S.C. §§ 78(a), *et seq.*, and a variety of state laws, including breach of fiduciary duty and fraud. The suit alleges that the defendants engaged in a pattern of racketeering activity beginning in 1983 and continuing throughout the litigation of this suit, that they committed or aided and abetted others in committing securities fraud and bankruptcy fraud, and that they breached their various fiduciary duties as officers, directors, and attorneys and defrauded the Petitioner by misrepresenting and failing to disclose material information.

The Fifth Circuit readily acknowledged, based on Hendrick's brief and supporting evidence, that the defendants' actions were "shocking". App. 6. Nevertheless, the Fifth Circuit affirmed the district court's order of summary judgment holding that all of the petitioner's claims are barred by the *res judicata* effect of a prior order of the bankruptcy court on February 13, 1985, and that petitioner is not entitled to relief from that order pursuant to Rule 60 of the Federal Rules of Civil Procedure. App. 18.

The pertinent facts are as follows. In November of 1983, Rodney Hendrick filed a Chapter 11 bankruptcy petition. At that time, Hendrick owned 310 shares or ten per cent of the stock in PFC, Inc., d/b/a Stingray Boat Company ("Stingray"), a closely-held corporation he helped form in 1979 operating out of South Carolina. By 1983, Hendrick had been removed as an officer and director of Stingray and had been excluded from the inner workings of the company. Among other actions, the

officers and directors of Stingray failed to disclose to him current and accurate financial information about the company, notices and minutes of meetings, offers to purchase the stock of the company, and even an offer to dismiss him from certain pending litigation against the company.

On or about December 22, 1984, certain of the defendants, with the knowledge and assistance of the others, acquired 60% of Stingray's stock for approximately $1.7 million and became owners along with Hendrick and James A. Fink, Jr. ("Fink"), the president of the company. About that time, the new owners also entered into a *secret* deal to purchase some of Fink's stock and pay him $750,000, withdraw $500,000 from the company as part of a bogus stock redemption, and convert the company to Chapter S and distribute the earnings of the company.

At the same time, the new owners made a "take-it-or-leave-it" offer to acquire Hendrick's 10% for $150,000. Hendrick's bankruptcy trustee sought full disclosure, asking in particular about Stingray's future plans and the sums to be paid to all parties in connection with the sale. The defendants responded with vague assurances, failing to disclose material facts and misleading the trustee regarding the value of the company and the defendants' financial arrangements and plans.

On February 7, 1985, after being pressured by creditors to accept the offer, the trustee applied to the bankruptcy court for authorization to sell Hendrick's stock for $150,000. Suspecting the offer to be inadequate, Hendrick filed an objection to the sale. The bankruptcy court held a brief hearing on the application six days later. The only witness to testify at the hearing, besides the trustee, was

Fink, who attended as a representative of the purchasers. The bankruptcy court asked Fink direct, detailed questions about Stingray's financial affairs, as well as what Fink knew about the financing of the acquisition and whether he would receive any financial benefits from it. Fink's responses, as it turns out, were fraudulent.[1] Indeed, the Fifth Circuit found that "serious misrepresentations were made." App. 9.

At the close of the February 13 hearing, although unable to tell whether the offer was fair or reasonable or whether all material information had been disclosed, the bankruptcy court reluctantly authorized acceptance of the take-it-or-leave-it offer, stating:

> I am going to be probably the third most surprised person in town if Mr. Hendrick knows all there is to know about that transaction. And that is only because you two [the bankruptcy trustee's attorney and Hendrick's attorney] are here. Under the circumstances, though, I don't think we have a choice, and I would expect that the trustee – it's going to take a substantial amount of effort looking into what did happen. But I don't think that we have a choice under the circumstances. And I would hope that the trustee will bring an action if he finds that there is a

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[1] Neither the trustee nor Hendrick had any evidence of fraud at the time of the sale. Indeed, the Fifth Circuit found that "neither Hendrick nor the court had full knowledge of all that had taken place in a complex scheme of facts." App. 6. The offer had been made only a few weeks earlier. Moreover, many of the documents that revealed the fraud were not even created, much less made available, until after the sale. Only by an extensive investigation, primarily through subpoenas of bank records, was the fraud finally uncovered.

> right on behalf of the estate to recovery of some sums if it's less than its proportionate share.
>
> Therefore, I will authorize the trustee to sell the stock for $150,000 and ask the trustee to continue to look at it at the same time.
>
> R.Ex. 8, at 43-44

The bankruptcy court subsequently signed an order authorizing the sale "for reasons orally assigned," (App. 73), and issued a minute entry "direct[ing] the trustee to continue to look at the transaction and to bring an action to recover claims on behalf of the estate if any is found to exist." App. 75-76. After the hearing, the trustee tendered the stock to Fink in exchange for a cashier's check in the amount of $150,000.[2]

Over the next eight months, the bankruptcy court authorized the trustee to hire special counsel and spend up to $25,000 to investigate the sale, authorized special counsel to conduct two rounds of extensive depositions in South Carolina and, following the depositions, authorized the trustee to file suit in federal district court against the defendants.[3] App. 79-80; R.Exs. 16, 18, and 19,

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[2] In its discussion of the facts, the Fifth Circuit panel repeats an error made by the district court, namely, that as "further consideration" for the estate's stock sale, Hendrick was dismissed from certain South Carolina litigation. App. 2. In fact, the South Carolina litigation against Hendrick was dismissed by Judgment entered on December 22, 1984, some 53 days before the sale of his stock, and was in no way consideration for the sale of his stock. App. 77-78. It was Hendrick's cross-complaint against Fink and another Stingray director that was dismissed, without prejudice, as further consideration for the sale.

[3] The bankruptcy judge subsequently stated: "I authorized – it is no question that I authorized the filing of the Complaint." (R.Ex. 19, at 20.)

at 16-20. After the trustee filed suit, the bankruptcy court abandoned it to Hendrick without objection by Hendrick's creditors. R.Ex. 21. Almost three years later, on the eve of trial, the district court ruled that the bankruptcy court's order of sale precluded this suit on the grounds of *res judicata* and granted summary judgment to all defendants. The district court also denied Hendrick's motions for relief under Rule 60(a) and Rule 60(b) of the Federal Rules of Civil Procedure. App. 18.

II. REASONS FOR GRANTING THE WRIT

A. Preliminary Statement

The elements necessary for application of *res judicata* are well-settled: (1) the parties must be identical in both suits; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) the same cause of action must be involved in both cases; and (4) there must have been a final judgment on the merits. *See, e.g., Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973 (1979). Neither the "same cause of action" nor the "finality" requirement was satisfied in this case. Instead, *res judicata* has been applied here to bar petitioner from ever having the opportunity to litigate his claims against the respondents. As this Court has warned:

> Because res judicata may govern grounds and defenses not previously litigated, however, it blockades unexplored paths that may lead to truth. For the sake of repose, res judicata shields the fraud and the cheat as well as the honest

> person. It therefore is to be invoked only after careful inquiry.
>
> *Brown v. Felsen*, 442 U.S. 127, 132, 99 S.Ct. 2205, 2210 (1979).

The petitioner implores this Court to afford him that right of "careful inquiry" before allowing the summary judgment issued in this case to shield the respondents from their fraud and deprive the petitioner of ever having his day in court. Alternatively, the petitioner requests that he be granted the opportunity to seek relief under Federal Rule of Civil Procedure 60(a).

B. Res Judicata Does Not Apply Because This Suit And The Prior Proceeding Do Not Involve The "Same Cause Of Action"

The Fifth Circuit's decision conflicts with the long-standing precedent of this Court, *e.g.*, *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970 (1979), and the decisions of the other Circuits uniformly requiring that a party have litigated or had a full and fair opportunity to litigate his claims in a prior proceeding before *res judicata* may be applied to bar a subsequent proceeding.

1. Hendrick Could Not Have Litigated His Current Claims In The Bankruptcy Action Because The Claim Did Not Even Accrue Until After The Alleged Final Judgment Had Been Entered

Here, Hendrick's claims did not even accrue until the bankruptcy trustee sold the stock on February 13, 1985. The sale took place *after* the bankruptcy court hearing granting approval to sell the stock. R.Ex. 50, at A-190-191. The bankruptcy order did *not* transfer Hendrick's stock

or require a sale – it was an authorization order, not a confirmation order. App. 73-74. It simply permitted a private sale between the trustee and a group of anonymous persons, none of whom was a party to the proceeding.[4] ,Hence, as a matter of simple logic, Hendrick's claims in this suit could not have been litigated in the bankruptcy proceeding.

Specifically, Hendrick could not have brought his securities fraud claims before the bankruptcy court hearing on February 13, 1985, because he would have had no standing to do so. A person may not sue under the federal securities laws unless and until there has been the purchase or sale of a security. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 753, 95 S. Ct. 1917, 1934 (1975). A Louisiana state law action may likewise not be brought until after the injury occurs – in this case, the sale of stock. *See, e.g., Sevier v. United States Fidelity & Guar. & Co.*, 497 So.2d 1380 (La. 1986). Thus, Hendrick has been forever deprived of his right to bring these actions even though he could not have brought them in the bankruptcy proceeding.

Similarly, a person may not seek recovery under the RICO statute until he suffers injury to "his business or property by reason of a violation [of section 1962(c)]. . . . Until such injury occurs, there is no right to sue for damages under § 1964(c), and until there is a right to sue

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[4] Not even the identity of the buyers of the stock was revealed prior to the sale. The letter Fink delivered to the bankruptcy trustee at the sale specifically requested that the stock certificates be left blank, to be "filled in when my associates and I have determined the proper transferee." (R.Ex. 9.)

under § 1964(c), a civil RICO action cannot be held to have accrued." *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102-03 (2d Cir. 1988), *cert. denied*, 109 S.Ct. 1642 (1989). Thus, Hendrick could not have brought his RICO claim in bankruptcy court before February 13, 1985.

Indeed, as a result of the Fifth Circuit's ruling, Hendrick is now held to be forever precluded from bringing his RICO claim. This holding conflicts with the language of the statute, which includes as a predicate act any "offense involving fraud connected with a case under Title 11 [*i.e.*, the Bankruptcy Code]." 18 U.S.C. § 1961(1). The Fifth Circuit's decision effectively reads this provision out of the statute. *Compare Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert denied*, 109 S.Ct. 1642 (1989), wherein the Second Circuit permitted the filing of a RICO suit in district court based upon fraudulent concealment of assets in a pending bankruptcy proceeding. In *Bankers Trust*, the plaintiff creditor submitted to a Plan of Reorganization without knowing that other assets belonging to the debtor had been fraudulently transferred. After discovering the cover-up, the plaintiff filed a RICO suit in district court, just as the plaintiff did here.[5] Unlike the Second Circuit, however, the Fifth

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[5] In fact, Hendrick's RICO claim relates to actions committed by the respondents before *and* after the hearing on the sale of the stock. All of the respondents, for example, participated in an extensive cover-up following the sale, and some of the respondents committed additional fraudulent acts prior to and unrelated to the offer to purchase the stock. Neither these claims nor the issues they present have *ever* been decided in a prior proceeding. They should not be barred.

Circuit has barred this plaintiff from ever litigating his RICO claim.[6]

2. Hendrick Could Not Have Litigated His Current Claims In The Bankruptcy Action Because He Lacked A Full And Fair Opportunity To Do So

Even if it might be said that Hendrick could have litigated his claims in the bankruptcy proceeding, he clearly did not have a full and fair opportunity to do so. Hendrick had only six days from the date the trustee's application to sell the stock was filed until the hearing. Indeed, the offer to purchase had been made less than 60 days before the hearing, and, during the interim, the trustee was told the offer was "take-it-or-leave-it" and that, if it were not accepted quickly, Hendrick would have to "remain a minority stockholder in the company even though that wouldn't be worth much to him." R.Ex. 6, at 67; R.Ex. 7, at 123. Neither Hendrick nor the trustee conceivably could have discovered the identities of all the purchasers, obtained and examined their records, taken

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[6] The real issue here is not whether Hendrick's claims are barred by *res judicata*. They clearly are not. The issue, if preclusion is relevant here at all, is whether the claims are barred by collateral estoppel. Once again, the answer is, they are not. "Collateral estoppel treats as final only those questions actually and necessarily decided in a prior suit." *Brown v. Felsen*, 442 U.S. 127, 140, n.10, 99 S. Ct. 2205, 2213, n.10 (1979). Here, neither the district court nor the court of appeals found that the bankruptcy court hearing on February 13, 1985, "actually and necessarily decided" the issues in this suit, and rightly so. At a minimum, the judgment should be vacated and the case remanded for the lower courts to consider the issue of collateral estoppel and afford Hendrick an opportunity to show why it does not apply.

their testimony, and uncovered the misrepresentations during that period. Indeed, only after two years, dozens of depositions, and thousands of pages of documents, did the true story (or most of it) emerge.

This Court has held that the purpose of *res judicata* is "[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate." *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973 (1979). Cognizant of this purpose, courts and commentators have repeatedly declared that *res judicata* should not be applied where the party against whom the doctrine is invoked was denied a full and fair opportunity to litigate his claims in a prior proceeding or where that party relied upon a judicial action in the prior proceeding that resulted in his case "passing the *res judicata* line." 1B J. Moore, J. Lucas, T. Currier, *Moore's Federal Practice*, ¶0.405[12], at 261-62 (1988); *see also Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481 & n. 22, 102 S.Ct. 1883, 1897 & n. 22 (1982); *La. Societe Anonyme Des Parfums Le Galion v. Jean Patou, Inc.*, 495 F.2d 1265, 1276 (2d Cir. 1974). To apply *res judicata* in this case would be both manifestly unjust and inconsistent with the doctrine's objectives.

The Seventh Circuit recently refused to apply *res judicata* for reasons that are especially relevant here.[7] In *Torres v. Rebarchak*, 814 F.2d 1219 (7th Cir. 1987), the plaintiff filed suit seeking both equitable and legal relief. Later, shortly after the parties had settled the case, the

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[7] *See also McCarty v. First of Georgia Insurance Co.*, 713 F.2d 609, 612-13 (10th Cir. 1983); *Ross v. International Brotherhood of Electrical Workers*, 634 F.2d 453, 458-59 (9th Cir. 1980).

court entered an order stating that "[a]ll prayers for equitable relief are dismissed without prejudice." *Id.* at 1220. The plaintiff subsequently filed suit against the same defendants for damages, as well as other relief. The defendants sought to dismiss the damages claim on the grounds of *res judicata,* stating that the plaintiff had attempted impermissibly to split her causes of action. *Id.* at 1223. The district court agreed.

On appeal, the Seventh Circuit reversed. The court declared that, since the district court's approval of the settlement expressly reserved for the plaintiff the right to sue subsequently for damages, *res judicata* was inapplicable. As to the public policy underlying the doctrine, moreover, the court stated:

> [A] contrary conclusion would not serve the policies underlying the doctrine of *res judicata* – protection of the defendant from harassment and the promotion of judicial economy. Here, the agreed upon judgment gave the defendants fair warning of a later suit.

Id. at 1226.

The respondents here, like the defendants in *Torres,* had "fair warning of a later suit." The evidence shows, for example, that throughout the hearing on February 13, 1985, Fink sat in the front row of the courtroom. R.Ex. 50, at A-114-115, A-190. At the start of the proceeding, the bankruptcy trustee expressly reserved any "cognizable claim against anybody for the manner in which this deal [i.e., the sale of the Stingray stock] has been structured." R.Ex. 8, at 5. At the close of the proceeding, the bankruptcy court "directed" the trustee to conduct a subsequent investigation into the sale and to file suit if he

discovered any wrongdoing. R.Ex. 8, at 44. Having heard the trustee reserve his rights and the bankruptcy court issue its directive, Fink nonetheless purchased the stock immediately after the hearing. When he handed the trustee a check to pay for the stock, moreover, Fink asked him "if this was the end of [the matter]." The trustee responded: "I told him not to be surprised if he saw me in South Carolina." R.Ex. 50, at A-190-191. The respondents thus had "fair warning of a later suit."

If anyone was deprived of a "fair warning" by the bankruptcy court's ruling (at least as interpreted by the district court and the Fifth Circuit), it was Hendrick. Hendrick, in fact, is in essentially the same position as the plaintiff in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 83 S.Ct. 283 (1962). There, the plaintiff invoked the "excusable neglect" provision of Rule 4(a) of the Federal Rules of Appellate Procedure, and sought an extension of time to file an appeal. The district court granted the request. The plaintiff then filed his appeal within the extension period but beyond the original period. The court of appeals, concluding that there had been no "excusable neglect" and that the district court had therefore erred in granting the extension, dismissed the appeal. The Supreme Court reversed and remanded "so that [the] appeal [could] be heard on its merits." *Id.* at 217, 83 S. Ct. at 285. The Court did so because "of the obvious great hardship to a party who relies upon [a] trial judge's finding of 'excusable neglect'

prior to the expiration of the 30-day period and then suffers reversal of the finding[.]" *Id.*[8]

Much like the plaintiff in *Harris Truck*, Hendrick relied on what the bankruptcy court said and did on February 13, 1985 and thereafter regarding the sale of the estate's Stringray stock. Much like the plaintiff in *Harris Truck*, moreover, Hendrick has suffered an "obvious great hardship" as a result of his reliance.

When the bankruptcy court "directed" Hendrick to investigate and later sue if appropriate, Hendrick followed the court's directive. When the bankruptcy court subsequently authorized Hendrick to sue under state and federal law, Hendrick acted on the court's authorization. Three years later, on the eve of trial, Hendrick is told that, to protect his rights, he should have either appealed the order authorizing the sale or petitioned for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure.[9] He is told that, although he was defrauded

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[8] *See also Thompson v. Immigration and Naturalization Service*, 375 U.S. 384, 84 S. Ct. 397 (1964) (plaintiff who relied on district court's statement that he had filed his post-trial motions "in ample time" was entitled to appeal even though the district court was in error); *Wolfsohn v. Hankin*, 376 U.S. 203, 84 S. Ct. 699 (1964) (following *Harris Truck* and *Thompson*).

[9] In response to the respondents' *res judicata* defense, Hendrick requested, alternatively, that the district court treat

(Continued on following page)

by a scheme the Fifth Circuit itself described as "shocking," and although he complied with all court orders and acted reasonably from start to finish, he has no remedy he may pursue. The law of *res judicata* does not permit such a result. The precedent of this Court and other Circuits requires that the summary judgment against Hendrick be reversed.

C. Res Judicata Does Not Apply Because The Bankruptcy Court Did Not Render A "Final Judgment" On The Merits Of Hendrick's Claims

Res judicata is also inapplicable because the February 13, 1985 order authorizing the trustee to sell the stock

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his complaint as a motion for relief from the bankruptcy court judgment or as an independent action for relief under Rule 60(b) of the Federal Rules of Civil Procedure. Hendrick's request was based upon the following factors: (1) the original Complaint was filed within one year of the bankruptcy sale order; (2) the original Complaint requested "all other and further relief as law, equity or the nature of the case may permit," and described in detail facts that, if proved, entitle him to relief under Rule 60(b); (3) Rule 54(c) of the Federal Rules of Civil Procedure requires that "every final judgment *shall* grant the relief to which the party in whose favor it is rendered in entitled, even if the party has not demanded such relief in his pleadings;" (4) because the bankruptcy court directed him to investigate and sue, and later authorized the filing of his Complaint, Hendrick had no reason to believe he needed to request specific relief under Rule 60(b); and (5) no prejudice to the respondents or any other persons has or can be shown by treating the Complaint as an action under Rule 60(b) in lieu of an independent suit, particularly on summary judgment. The district court nevertheless refused to treat the complaint as an action under Rule 60(b). (App. 41-69), and the Fifth Circuit affirmed this determination. App. 14-15.

was not a final judgment on the merits of Hendrick's claims. The order was not a final judgment because the bankruptcy court expressly reserved Hendrick's right to bring this action at the time it granted the application to sell and expressly authorized the filing of this suit. App. 73-76, 79-80; R.Ex. 8, at 43-44; R.Ex. 16; R.Ex. 18; R.Ex. 19, at 16-20.

Numerous courts and commentators have stated that *res judicata* should not be applied to bar litigation of a claim in a second action where the evidence shows the court in the first action reserved the plaintiff's right to litigate the claim in the second action: "If a court reserves for later resolution an issue that might otherwise have been adjudicated in the initial proceeding, *res judicata* will not operate to bar the subsequent suit." *In the Matter of Energy Cooperative, Inc.*, 814 F.2d 1226, 1233 (7th Cir.), *cert. denied*, 108 S.Ct. 294 (1987); *see also Stolberg v. Members of the Board of Trustees for the State Colleges of Connecticut*, 541 F.2d 890 893 (2d Cir.), *cert. denied*, 429 U.S. 897, 97 S.Ct. 260 (1976); *Blackwelder v. Millman*, 522 F.2d 766, 772-73 (4th Cir. 1975); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4413, at 106-07 (1982). Although the Supreme Court appears not to have considered this exact issue, the Court looks to the *Restatement (Second) of Judgments* for guidance in applying the doctrine of *res judicata*,[10] and the authors of the *Restatement* have declared that *res judicata* is inapplicable where "[t]he

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[10] *See, e.g., Nevada v. United States*, 463 U.S 110, 129, 135; 103 S. Ct. 2906, 2918, 2921 (1983).

court in the first action ha[s] expressly reserved the plaintiff's right to maintain the second action. . . ." *Restatement (Second) of Judgments* § 26(1)(b) (1982).

Here, the bankruptcy court expressly reserved Hendrick's right to maintain this action and never intended for the February 13 order to be final and to have *res judicata* effect. The order authorizing the sale of Hendrick's Stingray stock expressly incorporates the "reasons orally assigned" at the hearing.[11] App. 73. At the close of that hearing, the bankruptcy court declared:

> "I would hope that the trustee would bring an action if he finds that there is a right on behalf of the estate to recovery of some sums if it's less than its proportionate share. Therefore, I will authorize the Trustee to sell the stock for $150,000.00 and direct the Trustee to continue to look at it at the same time."
>
> R.Ex. 8, at 44.

Later the same day, following the hearing, the bankruptcy court issued a Minute Entry that was even more specific. In it, the "court directed the trustee to look at the transaction and bring an action to recover claims on behalf of the estate if any is found to exist." App. 76. Both the trustee and his counsel specifically recall that the bankruptcy court "directed" them at the hearing to investigate the circumstances of the sale following the

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[11] The order signed by the court was merely a form order prepared by the trustee's counsel in conjunction with the Application, filed six days *before* the sale, when the trustee's counsel had no idea that the bankruptcy judge would authorize the sale with a reservation of rights. R.Ex. 60 (Affidavit of David S. Rubin, Counsel to the Bankruptcy Trustee).

sale and to file suit if they uncovered wrongdoing. R.Ex. 50, at A-114, A-190.

Subsequent orders signed by the bankruptcy judge categorically confirm that he reserved the petitioner's right to bring this action. Approximately two months after the hearing, on April 19, 1985, the trustee asked the bankruptcy court to appoint special counsel to investigate the sale. R.Ex. 13. The bankruptcy court issued an order approving the request and authorized the trustee to spend up to $25,000.00 in connection with the investigation. App. 79-80. Shortly thereafter, in connection with the investigation, the trustee applied for authority to conduct depositions pursuant to Rule 2004 of the Bankruptcy Rules, and the bankruptcy court issued an order granting the trustee's request. R.Ex. 15 and 16. Following the first round of examinations, the trustee sought authority to conduct additional depositions in South Carolina. R.Ex. 17. Once again, the bankruptcy court ordered the additional Rule 2004 examinations. R.Ex. 18.

After the additional South Carolina depositions had been completed, the trustee sought approval from the bankruptcy court to file suit against the respondents, and the bankruptcy court approved the request. R.Ex. 19, at 20. In fact, shortly after the trustee filed suit, Judge Parker of the Middle District of Louisiana (who presided over this case prior to its transfer to another section of the same court) denied the respondents' motions to transfer venue and to dismiss, describing the bankruptcy court's action as follows:

> The Bankruptcy Court approved the sale, but directed Starns, as trustee, to investigate the propriety of the sale. After such an investigation, and *with* the *direction and authority of the Bankruptcy Court, the plaintiffs initiated this action*

> under The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*, under the Securities and Exchange Act of 1934, 15 U.S.C. § 78j and associated rules and regulations, and under various state law claims.
>
> R.Ex. 20 (emphasis added).

Thus, the bankruptcy court, through numerous orders and other documents, specifically approved the commencement of an investigation, the employment of counsel, the taking of discovery, and the determination of the probability of success and potential recovery. These successive actions, especially when coupled with the fact that the bankruptcy court authorized suit to be filed, would be inexplicable if the bankruptcy court had intended for its February 13, 1985 order to have preclusive effect. Given that the bankruptcy court reserved Hendrick's right to bring this action, the February 13 order may not reasonably be construed as a final judgment on the merits of Hendrick's claims in this suit. *Res judicata* is therefore inapplicable.

The Fifth Circuit's decision here conflicts with the "finality" requirement established by this Court, as well as the provisions of the Restatement (Second) of Judgments repeatedly relied upon by this Court and the decisions of other Circuits (including the Second, Fourth and Seventh) requiring that *res judicata* may not bar litigation of a claim reserved in one action for later resolution in another action.

D. The Fifth Circuit's Interpretation of Federal Rule of Civil Procedure 60(a) Conflicts With That Of Other Circuits And Impermissibly Limits Relief Under The Rule

On November 8, 1988, in order to preserve his cause of action in the event the district court found *res judicata*

applicable (and at the suggestion of the district court), Hendrick sought relief under Rule 60(a) of the Federal of Civil Procedure. Specifically, Hendrick asked the district court to revise the February 13, 1985 order at least to include the express reservation set forth in the Minute Entry filed by the court the same day. The district court denied Hendrick's motion. App. 36-41. The Fifth Circuit affirmed the district court's ruling. App. 12-14.

The exact language of Rule 60(a), in pertinent part, is as follows:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

The circuit courts are split over how this rule should be construed.

The Tenth Circuit has held that the line demarcating the rule "is drawn . . . between what is erroneous because the thing spoken, written or recorded is *not* what the person *intended* to speak, write or record, and what is erroneous because the person later discovers that the thing said, written or recorded was wrong. The former comes within rule 60(a); the latter does not." *Allied Materials Corp. v. Superior Products Co.*, 620 F.2d 224, 226 (10th Cir. 1980) (emphasis in original); *see also McNickle v. Bankers Life and Casualty Co.*, 888 F.2d 678, 682 (10th Cir. 1989).

Similarly, the Ninth Circuit has held that the "distinction between 'clerical mistakes' and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former

consist of 'blunders in execution' whereas the latter consist of instances where the court changes its mind". *Blanton v. Anzalone*, 813 F.2d 1574, 1577 n.2 (9th Cir. 1987); *see also Malloy v. Wilson*, 878 F.2d 313, 315 n.2 (9th Cir. 1989).

The Fifth Circuit, by contrast, has held that the scope of Rule 60(a) is "very limited." *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 668 (5th Cir.) (en banc), *cert. denied on other grounds*, 479 U.S. 930, 107 S. Ct. 398 (1986). According to the Fifth Circuit, "errors that affect substantial rights of the parties are outside the scope of Rule 60(a)." *Warner v. City of Bay St. Louis*, 526 F.2d 1211, 1212 (5th Cir. 1976). Any error that is not "of the sort that a clerk or amanuensis might commit, mechanical in nature" and that involves more than a mere "erroneous mathematical computation" is beyond the scope of the rule. *Harcon Barge*, 784 F.2d at 668-69. The Fifth Circuit rejected Hendrick's request for relief under Rule 60(a) on the ground that the correction Hendrick seeks is too substantial and involves more than simply fixing a mechanical error. App. 12-14.

Were Hendrick litigating his case in either the Ninth or Tenth Circuit, he clearly would be entitled to correct the bankruptcy court's judgment. Indeed, the correction Hendrick seeks is identical, in all relevant respects, to the correction the plaintiffs sought and obtained in *Allied Materials* and *Blanton*. In *Allied Materials*, the court intended to award $12,000.00 in damages but awarded only $1,200.00. The Tenth Circuit found revision of the judgment under Rule 60(a) to be appropriate in what the court said was not a hard case. *Allied Materials*, 620 F.2d at 226. In *Blanton*, the court originally awarded the plaintiff prejudgment interest but did not intend to do so. The Ninth

Circuit held that the judgment could be revised under Rule 60(a) to reflect the lower court's true intent. *Blanton*, 817 F.2d at 1577.

Hendrick seeks the same – a judgment that reflects the bankruptcy court's true intent. The evidence here shows that, when the bankruptcy court issued the February 13, 1985 order, the court intended to preserve Hendrick's right to file a subsequent suit if he discovered that the respondents had acted unlawfully in connection with the sale. In the Fifth Circuit, however, Hendrick may not seek such relief. The petition for certiorari should thus be granted to resolve the conflict among the circuits and clarify the proper scope of Rule 60(a).

III. CONCLUSION

The Fifth Circuit's decision stretches the law of *res judicata* beyond recognition. In applying the law of *res judicata* to the bankruptcy context, the Fifth Circuit has created a new rule that violates both the "same cause of action" and "finality" requirements adopted by this Court. Hendrick's claims under RICO, the Securities Exchange Act of 1934 and state law did not even arise until *after* the bankruptcy court entered its order authorizing the sale of his stock. Hendrick thus had no opportunity, let alone a full and fair opportunity, to litigate his claims before the bankruptcy court's order. Moreover, the bankruptcy court's order was not a final order that extinguished Hendrick's claim, since the bankruptcy court directed the trustee to investigate the sale and, if he

discovered wrongdoing, to file suit. Alternatively, Hendrick should be permitted to seek relief under Rule 60(a) to correct the language of the order to conform to the bankruptcy court's true intent, as embodied in each of its directives.

The Petition for Writ of Certiorari should be granted so that the Court may correct the error below, settle important questions of federal law, and resolve a conflict among the Circuits.

Respectfully submitted,

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Rodney D. HENDRICK,
Plaintiff-Appellant,

v.

H.E. AVENT, et al., An Unincorporated Association, Defendants-Appellees.

No. 89-3102.

United States Court of Appeals,

Fifth Circuit.

Jan. 11, 1990.

Debtor and trustee brought action challenging bankruptcy court's approval of sale of debtor's stock and alleging racketeering, securities fraud, misrepresentations, and breaches of fiduciary duty. The United States District Court for the Middle District of Louisiana, 96 B.R. 620, Frank J. Polozola, J., granted summary judgment in favor of defendants. Debtor appealed. The Court of Appeals, Garza, Circuit Judge, held that: (1) bankruptcy court's order was res judicate; (2) motion for relief from bankruptcy court's order was outside scope of rule for correcting clerical mistakes; and (3) action by debtor and trustee could not be recharacterized as motion for relief from judgment.

Affirmed.

GARZA, Circuit Judge:

Rodney D. Hendrick appeals the district court's grant of summary judgment in favor of defendants-appellees. 96 B.R. 620. Because we find this action in an improper

collateral challenge to a final judgment and cannot constitute a proper direct challenge, we affirm.

I. How It All Started.

Rodney D. Hendrick ("Hendrick") filed a voluntary petition under Chapter 11 of the Bankruptcy Code on November 21, 1983, in the Bankruptcy Court for the Middle District of Louisiana.[1] The bankruptcy court appointed Donald P. Starns ("Starns" or "Trustee") trustee of the debtor's estate. At the time of filing, Hendrick owned 310 shares of stock in a closely-held South Carolina corporation named PFC, Inc., d/b/a Stingray Boat Company ("Stingray"). On February 7, 1985, Hendrick's bankruptcy trustee, Starns, applied for authorization to sell Hendrick's stock for $150,000. Hendrick filed an objection to the sale of his Stingray stock.

On February 13, 1985, the bankruptcy court conducted an adversary hearing on the trustee's application to sell stock. The result of the hearing was the authorization and confirmation of the sale of Hendrick's stock in Stingray to James A. Fink Jr., with the express reservation that the trustee conduct an investigation into the facts alleged by Hendrick. Immediately after the hearing, Hendrick's stock was delivered to James A. Fink, Jr. and the trustee received $150,000, which was paid by a cashier's check drawn on a South Carolina bank. As further consideration for this transaction, Hendrick was dismissed as a party in a suit which had been filed against him in the Court of Common Pleas for the County of Darlington,

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[1] *In re Rodney D. Hendrick*, No. 83-00787.

South Carolina by Francis A. Collins, who was an officer, stockholder, and director of Stingray.

The next day, February 14, 1985, the Trustee applied to the bankruptcy court to employ special counsel to investigate the circumstances surrounding the February 13, 1985 stock sale. Pursuant to this investigation, the bankruptcy court issued three separate orders for Bankruptcy Rule 2004 examinations, due to the trustee's ongoing concern about the integrity of the offer and certain undisclosed and unknown facts. At no time did the trustee, Hendrick, or any other party to the bankruptcy proceeding file an appeal or any other post trial motions under Rules 52(b), 59(e), or 60(b)[2] of the Federal Rules of Civil Procedure to overturn, vacate, or modify the February 13, 1985 judgment of the bankruptcy court.

After the third set of depositions in the investigation, the trustee sought and obtained approval of the bankruptcy court to file suit in federal district court. On

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[2] Rule 60(b) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party. . . . The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . .

February 12, 1986, the trustee filed suit on behalf of Hendrick asserting fraud claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.*, and state law. Some time thereafter, the trustee, with the approval of the bankruptcy court, abandoned the claims as to Hendrick. On November 6, 1987, Hendrick and the trustee filed a second amended complaint, which added additional state law claims based on alleged misrepresentations, omissions, breaches of fiduciary duty, and sought rescission of the sale.

On December 4, 1987, the appellees filed a motion to dismiss and, in the alternative, for summary judgment. The appellees based their motion on the following grounds:

1. The order of the bankruptcy court was res judicata;
2. The suit was an impermissible collateral attack on a final judgment rendered by the bankruptcy court from which no appeal was taken; and
3. The second amended complaint could not be construed as a Rule 60(b) motion under the Federal Rules of Civil Procedure, and even if it was so considered, the motion was not timely filed.

The motion was denied with the suggestion that the court would be willing to reconsider the ruling if the motion were re-urged. On August 16, 1988, the motion was re-urged adding the following grounds:

4. Private rights of action to enforce Rule 10b-5 and RICO claims do not lie with regard to

the sale and purchase of securities in an exchange approved by the court; and

5. James A. Fink, Jr. was absolutely immune from civil liability for any misstatement or omission as a witness in the bankruptcy court.

On December 2, 1988, the trial court advised the parties that a motion for summary judgment had been granted in favor of all defendants. On January 24, 1989, the trial court issued its written judgment. Hendrick brought this appeal the next day.

II. The Method of Analysis.

A motion for summary judgment focuses the court's attention merely on disputes of material facts.[3] While the facts alleged by Hendrick are tantalizing, this appeal focuses only on the available methods of attacking the bankruptcy court's approval of the stock sale. At no time did the trustee, Hendrick, or any other party to the bankruptcy proceeding file an appeal or any other post trial motions under Rules 52(b), 59(e) or 60(b) of the Federal Rules of Civil Procedure to overturn, vacate, or modify the February 13, 1985 judgment of the bankruptcy court.

In light of this absence of appeal, the material facts are contained only in the question of whether these fraud, RICO, and rescission claims can be brought independently or whether they must be in the form of a Rule 60 modification of the judgment of the bankruptcy court. Consequently, the eloquent and intriguing story revealed

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[3] Federal Rule of Civil Procedure 56.

in appellant's brief, which is quite shocking, is not before us, except that it can be noted that at the time of the bankruptcy court ruling, neither Hendrick nor the court had full knowledge of all that had taken place in a complex scheme of facts.

III. Application of the Law.

In deciding this case, the district court determined (1) plaintiff's sole remedy to contest the February 13, 1985 order of the bankruptcy court under the facts of this case is through a Rule 60(b) motion; (2) plaintiff has not filed a Rule 60(b) motion; (3) the second amended complaint cannot be treated as a Rule 60(b) motion;[4] (4) even if the second amended complaint is treated as a Rule 60(b)(3) motion, the one year period to file such a motion has expired and cannot be extended by the court; and (5) even if the second amended complaint is treated as a Rule 60(b) motion to reopen the judgment for fraud on the court, the motion is without merit because there is no fraud committed on the bankruptcy court. The first step in analyzing the district court's analysis is to determine whether the collateral attacks used in this case are barred by res judiciata.

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[4] We must note that not all the parties to the bankruptcy action who would have a right to respond to a Rule 60(b)(3) motion are parties to this suit, including the creditors who received the money and the trustee. Furthermore, the second amended complaint only seeks a rescission of the stock sale, but is silent on reinstating the cause of action which was filed against and by Hendrick in South Carolina and was dismissed by the February 13, 1985 order.

A. Res Judicata

The test in this Circuit for determining whether a claim is barred by the doctrine of res judicata is as follows:

> "For a prior judgment to bar an action on the basis of res judicata, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits and the same cause of action must be involved in both cases.' " *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556, 559 (5th Cir.1983) (en banc), quoting *Kemp v. Birmingham News Co.*, 608 F.2d 1049, 1052 (5th Cir.1979).

i. *Final Judgment.*

After conducting an evidentiary hearing on February 13, 1985, the bankruptcy court issued an order which authorized and confirmed the sale of Hendrick's stock in Stingray. The first hurdle is whether the February 13, 1985 order was a final judgment. Neither Hendrick nor any other party appealed the February 13, 1985 order in accordance with Bankruptcy Rule 8001. Appellees contend that this order was a final judgment which can only be attacked by an appeal or by a motion filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.[5]

Bankruptcy Rule 9021 requires that every judgment "be set forth on a separate document." The order of February 13, 1985, which was prepared by the attorney

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[5] Bankruptcy Rule 9024 makes Rule 60(b) applicable to bankruptcy proceedings.

for the trustee and signed by Judge Wesley Steen, complies with Rule 9021. The District Court found the order signed by the bankruptcy judge on February 13, 1985 to be a final judgment and found plaintiff's contention that the order was interlocutory in nature was without merit. We find no error in the district court's finding.

The February 13, 1985 order authorized the sale of "all of the estate's shares of stock in PFC, Inc., said sale to be free and clear of all liens, claims, and encumbrances, including any and all alleged co-owner's rights or rights of first refusal of Judith Polk Hendrick." Thus, the order was an authorization to sell property of the bankrupt's estate. An order issued by the bankruptcy court authorizing the sale of part of the bankrupt estate is a final judgment[6] even though the order neither closes the bankruptcy case nor disposes of any claim.[7] As this Court stated in *Southmark Properties v. Charles House Corp.*, 742 F.2d 862 (5th Cir.1984):[8]

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[6] *See, e.g., In re Sax.*, 796 F.2d 994, 996 (7th Cir.1986). (" 'Final is interpreted more liberally in bankruptcy cases than in other federal cases.' *In re Barker*, 768 F.2d 191, 193 (7th Cir.1985) . . . Orders approving or failing to approve a sale of debtor's property are considered final decisions and are immediately appealable.")

[7] 28 U.S.C. § 158(d); *Met-L-Wood Corp. v. Pipin*, 861 F.2d 1012, 1016 (7th Cir.1988) (An order which authorized the sale of the debtor's property "is appealable as a final order under 28 U.S.C. § 158(d)"); *See also In re Sax*, 796 F.2d 994 (7th Cir.1986); *In re Delta Services Industries*, 782 F.2d 1267 (5th Cir.1986); *Southmark Properties v. Charles House Corp.*, 742 F.2d 862 (5th Cir.1984); I. Collier on Bankruptcy § 3.03 at 3-156 (5th ed. 1986).

[8] *See also, Childress v. Aurora Nat'l Bank (In re Childress)*, 851 F.2d 926 (7th Cir.1988); *Bayer v. Nicola (In re Bestmann)*, 720 F.2d

(Continued on following page)

> There is no real doubt that the district court possessed jurisdiction to authorize and approve a trustee's sale. *See* 11 U.S.C. §§ 515, 516(3).
>
> That the district court's order authorizing the sale of the . . . [property] and judgment confirming the sale and passage of title . . . operated as "a final judgment on the merits" is evident.

742 F.2d at 870.

Despite the bankruptcy court's reservation, the judgment remains final and the sale authorized. The reservation serves only as an avenue to later appeal that final judgment.

ii. The Other Elements.

Hendrick claims that, among other things, the parties are not identical, and most importantly, that the same cause of action was not involved in both cases.

The facts asserted by Hendrick, if true, are quite convincing that he clearly did not know the whole story and serious misrepresentations were made. Hendrick thus claims that *D-1 Enterprises, Inc. v. Commercial State Bank*, 864 F.2d 36 (5th Cir.1989) controls this case. The opinion issued after rehearing in *D-1 Enterprises* states that res judicata has no application to contested matters

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(Continued from previous page)

484 (8th Cir.1983); *Sulmeyer v. Karbach Enterprises (In re Exennium, Inc.)* 715 F.2d 1401 (9th Cir.1983); *Gross v. Russo (In re Russo)*, 762 F.2d 239 (2d Cir.1985).

where the claim sought to be barred could not have been effectively litigated. *D-1 Enterprises*, 864 F.2d at 40.

Hendrick asserts that since he was unable to litigate his claims at the bankruptcy court level, and no new claims may be asserted on appeal, that he has no other means to litigate his claims than a separate lawsuit.

The appellees respond, as the district court ruled, that the opportunity to litigate these claims was given during the bankruptcy hearing, and now the only way to assert those claims is through a direct attack on the judgment.

The distinction between *D-1 Enterprises, Inc. v. Commercial State Bank* and *Southmark Properties v. Charles House Corp.* is a fine but important one. This Court, in *D-1 Enterprises*, carefully outlined the holding of *Southmark* and its application in light of the new decision in *D-1 Enterprises*. This Court focused on whether the claim sought to be barred could have been effectively litigated.

In *Southmark*, the sale was a court-ordered public cash auction, in which the secured creditor bid the full amount of its claimed debt. The orders of sale and confirmation, therefore, necessarily determined not only that the amount bid was actually owing, but also that the maturity of the debt has been validly accelerated. That is, that the sale provided a valid transfer of title to the buyer, which is inconsistent with the crux of the debtor's later action. Insofar as the later action claimed that the creditor "improperly assumed ownership of . . . [the property] by way of the [reorganization] trustee's sale," it was likewise inconsistent with the sale and confirmation orders. 742

F.2d at 869. The orders were, therefore, res judicata to the later action.

In *D-1 Enterprises*, the context is quite different. The abandonment order there, which does not contemplate a public cash auction, did not necessarily determine the precise amount of the debt or that it was validly accelerated, and the subsequent adversary proceeding does not in substance challenge the creditor's acquisition of title. 864 F.2d at 39.

The scenario before us today closely resembles that the *Southmark*, in that the determination by the bankruptcy court is the final authorization of the transfer of title and the subsequent adversary proceeding is a direct challenge to that transfer of title. The initial determinations by the bankruptcy court are directly inconsistent with the crux of Hendrick's later actions. Further, as to the opportunity to effectively litigate in the initial proceeding, the trustee in *D-1 Enterprises* was forced to defend the creditor's motion to lift the stay or risk loss of the estate's assets. In this case, the trustee brought the application to sell debtor's property. This application was done by the trustee at his own election and filed at the time of his choice. Hendrick asserts that while the trustee brought the application, he objected to the sale and was not able to effectively litigate his concern. However, the bankruptcy court authorized independent counsel and depositions, and suggested that any information obtained be returned to the court. Hendrick did not elect to do so. Consequently, the facts do not support the application of *D-1 Enterprises* analysis.

The finality and integrity of the transfer of stock resulting from the bankruptcy court's decision are at stake.[9] As we have found that appellant's later claims were inconsistent with the crux of the initial decision and he had the opportunity to effectively litigate his claim in the bankruptcy court, the proper medium for a challenge to the original bankruptcy court's order is through a direct challenge of that order. The collateral attacks brought later are barred by res judicata.

B. Direct Attack

i. Rule 60(a)

Appellant asserts a claim under Rule 60(a) that the judgment should be corrected because it does not reflect the true intent of the bankruptcy court. This argument is flawed from its inception, in that Rule 60(a) is useful only for correcting clerical mistakes.[10] This Court has previously addressed the question of what constitutes a clerical mistake. In *Harcon Barge Co. v. D & G Boat Rentals*, 784 F.2d 665, 668-69 (5th Cir.1986) (en banc) *cert. denied*,

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[9] This Court has previously recognized the important interest in the finality of judgments in a bankruptcy case. *Abraham v. Aguilar*, 861 F.2d 873 (5th Cir.1988). See also, *In the Matter of Colley*, 814 F.2d 1008, 1010 (5th Cir.1987), reh'g denied, 818 F.2d 443 (5th Cir.1987), cert. denied, 484 U.S. 898, 108 S.Ct. 234, 98 L.Ed.2d 193 (1987).

[10] *See also, Jones v. Anderson-Tully Co.*, 722 F.2d 211, 212 (5th Cir.1984); *Trahan v. First National Bank*, 720 F.2d 832, 833-34 (5th Cir.1983), judgment of the district court aff'd, 747 F.2d 990 (5th Cir.1984) (per curium). *See also, In re Galiardi*, 745 F.2d 335, 337 (5th Cir.1984); *West Virginia Oil & Gas Co. v. George E. Breece Lumber Co.*, 213 F.2d 702, 705 (5th Cir.1954).

479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986), this Court stated:

> The scope of Rule 60(a) is, as we have noted, very limited. In *Dura-Wood Treating Co., Division of Roy O. Martin Lumber Co. v. Century Forest Industries, Inc.*, [694 F.2d 112 (5th Cir.1982)], the court set out these limits:
>
> > Rule 60(a) finds application where the record makes apparent that the court intended one thing but by merely clerical mistake or oversight did another. Such a mistake must not be one of judgment or even of misidentification, but merely of recitation, of the sort that a clerk or amanuensis might commit, mechanical in nature. . . . (Citations omitted).
>
> Thus, it is proper to use Rule 60(a) to correct a damages award that is incorrect because it is based on an erroneous mathematical computation, whether the error is made by the jury or by the court. Errors of a more substantial nature are to be corrected by a motion under Rule 59(e) or 60(b). Correction of an error of "substantive judgment," therefore, is outside the reach of Rule 60(a).

Further, in *Warner v. City of Bay St. Louis*, 526 F.2d 1211, 1212 (5th Cir.1976), we refused to treat even the amount of interest to be paid on a judgment as a clerical error. This Court stated that "errors that effect substantial rights of the parties are outside the scope of Rule 60(a)." *Id.* 1212. The bankruptcy judge read and signed the judgment. The judgment entered mirrored the one rendered, therefore, the attack resembles a claim of judicial rather than clerical error. Relief granted under this method of

attack would clearly undermine the finding of the judgment, which is the policy behind the promulgation of Rule 60(b).

ii. Rule 60(b)

At the outset, Rule 60(b) requires a motion within a reasonable time not to exceed one (1) year after the judgment was entered or taken.

The district court found the motion to be untimely and without merit. The district court stated that Hendrick made no formal motion under Rule 60(b) in either the bankruptcy court or in the district court. In fact, Hendrick failed to mention Rule 60(b) in the original or three amended complaints, in the pretrial order, or in any amendment to the pretrial order. Even if the district court were to "liberally construe" Hendrick's pleadings, the district court properly determined that the complaint could not have been filed for a number of reasons.[11]

Appellant asserts the characterization of his second amended complaint as a Rule 60(b) motion, only so far as if that is the only method of attacking the bankruptcy court's decision. The law and policy surrounding a Rule 60(b) motion is clear that this motion was intended to be

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[11] The amended complaint is not a proper vehicle to bring a Rule 60(b) motion, and, assuming arguendo it was, the request was not timely filed under Rule 60(b). Further, the motion should have been filed in the bankruptcy court, not in the district court, and all of the parties in the original action are not in this action, which would circumvent the sharing of benefits of a Rule 60(b) motion with such parties as the trustee if the motion were to be granted.

the only method of attacking a final judgment and not to be used in abundance. Consequently, a judicial recharacterization of a lawsuit to fit this mold would be rare indeed. Clearly, making appellant's claim fit under the label of a Rule 60(b) motion would take a recharacterization of the pleadings *plus* a relation back in time to the original complaint to fit within the time restraints. The district court properly refused to perform such feats.

IV. The End Result

There are several different avenues to bar appellant's claims. First, no motion was made attacking the bankruptcy court's judgment. Second, certainly none of the post-judgment filings could be considered a Rule 60(a) motion. Third, some extensive legal gymnastics would have to be performed to consider the second amended complaint a Rule 60(b) motion and then to have it relate back far enough for it to be timely.

Assuming this is not a direct attack on the judgment, the focus is when whether this collateral attack is barred by res judicata. The key question is whether Hendrick had the opportunity to present his case at the time of the bankruptcy court's ruling. If not, pursuant to *D-1 Enterprises*, the adverse hearing in the bankruptcy court should not be used against him. The facts of *D-1 Enterprises* do not apply to our scenario, and consequently leave Hendrick to litigate his claims in the proper forum of the bankruptcy court.

In sum, the finality of the bankruptcy order mandates that, unless the opportunity to effectively litigate in the bankruptcy court is absent, any future challenges to that

order will be either in the form of appeal or amendment of the judgment. Accordingly, the judgment of the district court is, in all things, AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DONALD P. STARNS, in his capacity as Trustee for Rodney D. Hendrick, Chapter 11 Debtor, and RODNEY D. HENDRICK

versus

H. E. AVENT, ET AL

CIVIL ACTION
NO. 86-86-B

Filed Jan. 26, 1989

JUDGMENT

For the written reasons assigned:

IT IS ORDERED AND ADJUDGED that judgment shall be entered in favor of the defendant(s) and against the plaintiff(s) dismissing this suit with prejudice at plaintiff's costs.

Baton Rouge, Louisiana, January 26, 1989.

/s/ Frank J. Polozola
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DONALD P. STARNS, in his capacity as Trustee for Rodney D. Hendrick, Chapter 11 Debtor, and RODNEY D. HENDRICK — CIVIL ACTION

VERSUS — NUMBER 86-86-B

H. E. AVENT, ET AL

* * *

FRANK J. POLOZOLA, District Judge:

Rodney D. Hendrick filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code on November 21, 1983 in the Bankruptcy Court for the Middle District of Louisiana.[1] Donald P. Starns was appointed trustee of the debtor's estate. During the course of these proceedings the attorney for the trustee filed an application with the bankruptcy court seeking authority to sell 310 shares of stock which Hendrick owned in PFC, Inc. d/b/a Stingray Boat Company ("Stingray").

Stingray is a South Carolina corporation which is engaged in the manufacture and distribution of recreational boats. Hendrick filed an objection to the sale of his Stingray stock. The bankruptcy judge conducted an adversary hearing and on February 13, 1985 authorized and confirmed the sale of Hendrick's stock in Stingray to James A. Fink, Jr. Immediately after the hearing on February 13, 1985, Hendrick's stock was delivered to James A.

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[1] In Rodney D. Hendrick, No. 83-00787.

Fink, Jr. and the trustee received $150,000 which was paid by a cashier's check drawn on a South Carolina bank. As further consideration for this transaction, Hendrick was dismissed as a party in a suit which had been filed against him in the Court of Common Pleas for the County of Darlington, South Carolina by Francis A. Collins, who was an officer, stockholder and director of Stingray.

On February 14, 1985, the trustee filed an application with the bankruptcy court seeking to employ special counsel to investigate the circumstances surrounding the February 13, 1985 stock sale. Numerous depositions, which were authorized by the bankruptcy court under Bankruptcy Rule 2004, were taken in connection with this investigation. At no time did the trustee, Hendrick, or any other party to the bankruptcy proceeding file an appeal or any other post trial motions under Rules 52(b), 59(d)(e) or 60(b) of the Federal Rules of Evidence to overturn, vacate or modify the February 13, 1985 judgment of the bankruptcy court. The trustee filed this suit on February 12, 1986 on behalf of Hendrick.

The original complaint was filed under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, et seq. ("RICO"), the Securities and Exchange Act of 1934 (15 U.S.C. § 78(j)) and the Rules and Regulations of the Securities and Exchange Commission, including without limitation 10 B-5 (17 C.F.R. § 240.10 B-5). Named as defendants in the original complaint were the following parties: H.E. "Bobby" Avent, Sr. and his son, Mark S. Avent, directors of Stingray since January 31, 1985, and two of the ultimate purchasers of Hendrick's stock; Brantley T. Burnett; W. J. Kinney, a director of Stingray

after February 13, 1985 and one of the ultimate purchasers of Hendrick's stock; James A. Fink, Jr., an owner, director, and president of Stingray from 1979 through the date of the filing of this complaint; Deborah W. Fink, the wife of James A. Fink, Jr. who was a director and the secretary-treasurer of Stingray during the negotiations for the purchase of Hendrick's stock; and John C. Lindsay. The plaintiff filed a second amended complaint on November 6, 1987 which added several state law claims, based on misrepresentations, omissions, breach of fiduciary duty and rescission of contract.

The defendants have filed a motion to dismiss and, in the alternative, a motion for summary judgment.[2] Defendants base their motion on the following grounds:

(a) This suit is an impermissible collateral attack on a final judgment rendered by the bankruptcy court on February 13, 1985 to which no appeal was taken;

(b) Private rights of action to enforce Rule 10b5 and RICO claims do not lie with regard to the sale and purchase of securities in an exchange approved by a court;

(c) Plaintiff's second amended complaint cannot be construed as a Rule 60(b) motion under the Federal Rules of Civil Procedure, and even if it is considered as a Rule 60(b) motion, the motion is not timely;

(d) James A. Fink, Jr. is absolutely immune from civil liability for any misstatement or

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[2] This is the second time the defendants have filed this motion. The Court denied the first motion which was based on the same grounds.

omission as a witness in the bankruptcy court; and

(e) The order of the bankruptcy court is res judicata.

The plaintiff has filed an opposition to the defendants' motion. Plaintiff contends he does have the right to bring the pending action even though no appeal was taken by the bankruptcy court because the bankruptcy court has authorized the current suit. Plaintiff further contends that the Court should change the judgment entered by the bankruptcy court on February 13, 1985 under Rule 60(a) of the Federal Rules of Civil Procedure to clearly reflect this fact. Plaintiff also argues that his second amended complaint should be considered as a Rule 60(b) motion. Should the Court consider the second amended complaint as a Rule 60(b)(3) motion, plaintiff contends the motion is timely filed because the amendment relates back to the date the original complaint was filed. Finally, plaintiff contends the Court should treat his second amended complaint as a Rule 60(b) motion alleging the defendants committed a fraud on the bankruptcy court.

For reasons which follow, the Court finds that defendants' motion to dismiss or in the alternative for summary judgment should be granted.

I. Background:

Stingray was formed on March 19, 1979. Its headquarters is located in South Carolina. When the corporation was formed, 100 shares of stock at $10.00 par value were issued. Additional funds which were necessary to

form the corporation came from a secured loan from Louisiana National Bank in Baton Rouge. Hendrick received ten shares of stock and Herb Polk, James A. Fink, Jr., and Francis A. Collins received thirty shares each. At the time the corporation was formed, Hendrick was married to Judy Polk, who was Herb Polk's daughter. Hendrick and his wife were divorced on April 15, 1983. James A. Fink, Jr., Hendrick and Collins were the initial directors of Stingray and served as president, vice president and secretary-treasurer, respectively. On June 12, 1981, a stockholders' meeting was held in Hartsville, South Carolina. During this meeting, Stingray was authorized to issue 3,000 shares of common stock at $10.00 par value. Herb Polk received 1,800 shares of this stock, James A. Fink, Jr. received 900 shares, and Hendrick received 300 shares. Thus, the ownership of Stingray was as follows:

	Pre-Issue	Post-Issue
Herb Polk	30%	59%
James A. Fink, Jr.	30%	30%
Collins	30%	01%
Hendrick	10%	10%

At the June 12, 1981 meeting, Collins was removed as a director of Stingray and was replaced by Herb Polk.

Stingray held another stockholders' meeting on April 21, 1983. At this meeting, Judy Polk replaced Hendrick as a director and vice-president of the company. The board of directors also included James A. Fink, Jr., Debbie Fink and Herb Polk. The board named James A. Fink, Jr. as

president, Judy Polk as vice-president, and Debbie Fink as secretary-treasurer.

On October 23, 1983, Collins filed a suit in the Court of Common Pleas for the County of Darlington, South Carolina (No. 83-CP-16-570) seeking equitable and monetary relief from Stingray, James Fink, Herb Polk, and Hendrick. Collins contended in his suit that there were various irregularities and improprieties committed by these defendants in connection with the June 12, 1986 stock issue of Stingray.[3] Collins was represented in the South Carolina suit by James M. Saleeby, Edward E. Saleeby and John J. James II. The defendants in the South Carolina suit were represented by Lindsay and Henry Hammer.

On November 21, 1983, Hendrick filed his Chapter 11 petition with the bankruptcy court for the Middle District of Louisiana. The bankruptcy court authorized the trustee to retain the services of John M. Milling, a South Carolina attorney, to represent the interest of the trustee in Collins' South Carolina lawsuit. Milling then filed an amended answer and a cross-claim against James A. Fink, Jr., Herb Polk, and Stingray.

During this time Dwight Holder and Gil Walker, two individuals who were interested in purchasing a controlling interest into PFC, Inc., received and reviewed certain financial information of the company. They were assisted

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[3] As will be discussed hereinafter, Collins has also filed a suit in the Middle District of Louisiana. Collins v. Polk, CA 851165-B (M.D. La. 1985). This suit arises out of the settlement of the South Carolina litigation and the sale of Collins' stock in Stingray.

in this investigation by Raymond Mosteller, a certified public accountant. In September of 1984, Lindsay and Ed Saleeby met with Mosteller and Holder. In November of 1984, Lindsay informed H.E. Avent, Sr., Don Wason, and Brantley Burnett of Stingray and suggested to them that this was a good investment which they should consider. Thereafter, these parties and their certified public accountants made examinations of the financial records of the company. After this investigation was completed, H.E. Avent, Sr. and Burnett indicated that they had an interest in acquiring a controlling interest in Stingray. After visiting the boat company and reviewing financial information, H.E. Avent, Sr. contacted South Carolina National Bank ("SCN") about financing a purchase of 70% of the stock. On December 21, 1984, James A. Fink, Jr. travelled to Baton Rouge, paid off a Stingray loan at Louisiana National Bank and received from the bank certain stock certificates pledged to secure the loan. James A. Fink, Jr. also delivered Hendrick's stock certificate to the trustee on this date. On December 22, 1984, a meeting was held in the office of Edward Saleeby wherein a release was executed and Collins delivered his stock certificate in Stingray endorsed in blank and received a check from SCN for $200,000.00. Arrangements were also made at this meeting for the immediate wire transfer of $650,000.00 to Collins' account in a bank in Nashville, Tennessee. Less than a week later, H. E. Avent, Sr., Brantley Burnett, W. J. Kinney and Mark S. Avent obtained a loan from SCN in the amount of $1,994,000.00, which loan was, in part, for the refinancing of a $1,050,000.00 loan and paying for an $800,000.00 transfer of funds to Herb Polk. The corporation, through James A.

Fink, Jr., certified as part of the December 28, 1984 loan agreement that the ownership of the stock in PFC, Inc. would not be altered without the approval of SCN.

In January of 1985, James A. Fink, Jr. became concerned about the delay in receiving his money. He telephoned Lindsay, the Avents and John Milling. During the same month, James A. Fink. Jr. and his wife sought to purchase a beach house in Myrtle Beach, South Carolina for approximately $320,000. The Finks sought to determine whether they would have to borrow funds for this house or could pay for the beach house in cash. On January 9, 1985, James A. Fink, Jr. went to the Bank of Hartsville to borrow $200,000.00 for the beach house and signed a financial statement showing as an asset a "note payable" for $750,000.00 due January 11, 1985, and as a liability an attorney's fee payable in the amount of $75,000. This $75,000.00 attorney's fee was payable to Lindsay.

The Bankruptcy Court for the Middle District of Louisiana then became involved in these transactions. On February 7, 1985, David Rubin, on behalf of the trustee, filed an application to sell Hendrick's stock in Stingray. A hearing on the trustee's application was set for February 13, 1985. On the day of the hearing,[4] Hendrick's attorney filed an objection to the sale. Present for the hearing were Donald Starns, the trustee; David Rubin, attorney for the

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[4] There are several different transcripts of this hearing. The original court reporter for the bankruptcy court apparently was unable to find or transcribe her notes. The transcript was then prepared from a tape and an enhanced version of the same tape by another court reporter.

trustee; William E. Steffes, attorney for the debtor; Samera Abide, attorney for Judith Polk; and, James A. Fink, Jr. who testified as a witness. Although Hendrick filed an objection to the sale of stock, Judy Polk waived any rights she had in the stock and advised the bankruptcy court she had no opposition to the sale. The attorney for the trustee advised the court that although he had "some concerns about the manner in which the offer was made and has some concern that the trustee is not receiving the equivalent value to that received by other shareholders of PFC, Inc.," the offer should be accepted "under the circumstances."[5] The bankruptcy court, after conducting the hearing, approved the sale of the stock over the debtor's objection. A minute entry was filed in the record by the court on February 13, 1985. The court also signed a judgment on February 13, 1985 which provided:

> This matter came up for hearing on Application by Donald P. Starns, Trustee, seeking authority to sell stock free and clear of all liens, claims, and encumbrances, including co-owner's rights, and to dismiss litigation.
>
> CONSIDERING the Application, the record of this case, the evidence presented, the stipulation of counsel for Judith Polk Hendrick, good grounds appearing therefor, for reasons orally assigned;
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> IT IS HEREBY ORDERED that Donald P. Starns, is hereby authorized to sell all of the estate's shares of stock in PFC, Inc., said sale to be free and clear of all liens, claims, and encumbrances, including any and all alleged

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[5] Bankruptcy court transcript, p. 3.

co-owner's rights or right of first refusal of Judith Polk Hendrick.

IT IS FURTHER ORDERED that Donald P. Starns, Trustee, is hereby authorized to execute any and all documents in conjunction with the sale, to endorse and deliver the stock, to dismiss the cross-complaint referenced in the Application, and do any and all other matters in order to effectuate its intents and purposes of this Order.

Immediately after the hearing on February 13, 1985, Hendrick's stock was delivered to James A. Fink, Jr. with the name of the purchaser left blank pursuant to the instructions of H. E. Avent, Sr. The $150,000.00 purchase price was paid by a cashier's check which had been obtained from SCN. On February 14, 1985, the trustee filed a supplemental application for authority to employ special counsel to conduct an investigation concerning the circumstances surrounding the offer received by the trustee for the purchase of Hendrick's interest in Stingray. On April 19, 1985, the trustee hired the law firm of Stone, Pigman, Walthers, Wittman and Hutchinson as special counsel. On October 16, 1985, the bankruptcy court approved the trustee's request to allow the depositions of H. E. Avent, Sr., James A. Fink, Jr., Deborah Fink, PFC, Inc., John C. Lindsay and Edward E. Saleeby to be taken pursuant to Bankruptcy Rule 2004. As noted earlier, Collins filed a suit in the Middle District of Louisiana entitled *Collins v. Polk*[6]. Named as defendants in the *Collins* suit were James A. Fink, Jr., Deborah Fink, H. E. Avent, Sr., Mark Avent, W. J. Kinney, Brantley Burnett, John

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[6] 115 F.R.D. 326 (M.D. La. 1987). See also Footnote 2.

Lindsay, Herbert Polk, Judith Polk Hendrick, and Polk Chevrolet.

On April 17, 1986, the bankruptcy judge issued the following order:

> Until further order of the Court, the trustee is prohibited from further pursuit of any legal action against any parties in connection with the sale of Stinger Boat stock, formerly property of the estate, except such actions and procedures as the trustee may be required by the District Court to take and except such actions and procedures as may be necessary to preserve rights of the estate against lapse or loss on account of the running of time.
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> The Court will hear, beginning at 9:30 a.m. on July 7, 1986, the following parties:
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> (1) The trustee and general counsel for the trustee;
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> (2) Special counsel for the trustee;
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> (3) H. E. Avent, Mark S. Avent, Brantley T. Burnett, W. J. Kinney, James A. Fink, Jr., Deborah W. Fink, and John C. Lindsay, represented by Mr. John L. Avant;
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> (4) Judy Polk, Herbert Polk, and Polk Chevrolet, Inc.
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> The issues to be heard are:
>
> (1) Whether to authorize the trustee to continue civil proceedings for damages and/or for other relief in connection with the sale of Stinger Boat Co. stock or whether to direct the trustee to seek dismissal of said action;
>
> (2) Whether to authorize special counsel to continue to represent the trustee in connection with said civil action(s);

(3) Whether the trustee and/or special counsel have abused the process and authority of the Bankruptcy Court in such a way as to justify sanctions, and, if so, what sanctions are just. In connection with this issue, the hearing will not consider sanctions more properly imposed in the civil action(s) before the District Court, but will be confined to sanctions appropriate in the administration of a bankruptcy case.

On the same date, the bankruptcy court issued the following reasons for the above order:

> The trustee brought on for hearing his motion for authority to continue the employment of special counsel in pursuit of a civil action for damages (and conceivably for other relief) in connection with the sale of Stinger Boat stock. Objections to the continued employment of special counsel included allegations that the trustee and special counsel have abused the process of the Bankruptcy Court.
>
> After hearing counsel, the Court concludes that the allegations are sufficiently serious to warrant a full hearing concerning the propriety of the trustee's actions and concerning whether current special counsel should be allowed to continue to represent the trustee in connection with these proceedings. The hearing will include, as interested parties, the objectors (defendants in the Civil Action) represented by Mr. Avant, the trustee, and special counsel for the trustee. The findings will be binding on those parties for all purposes of the administration of the bankruptcy case, but will not extend to, or have any effect on, any other case, civil action, or proceeding.

Because the Hendrick suit was abandoned, the bankruptcy judge did not rule on the request for sanctions based on the alleged abuse of orders of the bankruptcy court. However, on June 20, 1986, the bankruptcy court entered an order which stated:

> The Court has not considered and will not consider the question of whether the trustee and/or trustee's counsel acted improperly since no significance remains of that issue in this bankruptcy case, since no party wishes the Court to consider the issue in this bankruptcy case, and since the most significance and effective relief regarding the misconduct, if any there was, can most adequately be addressed in a motion for sanctions in connection with the Debtor's Civil Action 86-86-A against H. E. Avent, *et al* now pending before a District Judge of this court.

After the above orders were issued, the trustee filed a motion to "abandon and disclaim certain property from" the debtor's estate, which included Hendrick's suit which is now pending before this court. On June 18, 1986, the bankruptcy court granted the trustee's motion and this lawsuit was abandoned to Hendrick who was then substituted as a plaintiff in place of the trustee. The allegations surrounding the Rule 2004 depositions which concerned the bankruptcy court were brought before this Court in the *Collins* suit. The facts of the *Collins* case insofar as they are pertinent to the issues now before this Court were set forth in *Collins v. Polk*, 115 FRD 326, 328-29 (M.D. La. 1987):

> The facts that relate to this motion are rather complex and involve two related actions, one in the bankruptcy court and another pending before this Court. Prior to the time this suit was

filed, the trustee of a pending action in the bankruptcy court was authorized to conduct an investigation regarding alleged fraud and the selling of an asset of the bankrupt estate. This transaction involved the sale of PFC stock. Thereafter, the trustee in the bankruptcy action sought and obtained leave of court under Rule 2004 of the Bankruptcy Code to take certain depositions in connection with the bankruptcy proceeding. The trustee, apparently without advising the bankruptcy court, enlisted the expertise of Mr. Collins, the plaintiff in this suit. Apparently Mr. Collins had been involved in many of the transactions that the trustee was investigating. Thereafter, Mr. Collins accompanied the attorney for the trustee in taking the depositions which were authorized pursuant to Rule 2004 of the Bankruptcy Code. Mr. Collins then participated in a round of depositions taken by the attorney for the trustee. Mr. Collins then filed his initial complaint based on the information he had obtained in the 2004 depositions taken for the bankruptcy court. At no time did Mr. Collins inform the defendants of his intention to use the information in the depositions to file a lawsuit. It is also clear that the notice of depositions required by Rule 27 of the Federal Rules of Civil Procedure was not sent to the defendants. Without serving the defendants with his complaint filed in this action as required by Rule 4 of the Federal Rules of Civil Procedure nor advising them of the fact that the suit had been filed, Mr. Collins then proceeded with the second round of depositions taken for the attorney of the trustee in the bankruptcy matter. At no time during these depositions did he inform the parties whose depositions were taken and who are now defendants in this suit that a lawsuit had been filed against them. It is also clear that the requirements of Rule 27 of the

Federal Rules of Civil Procedure were not complied with. After conducting a second round of depositions, the trustee, acting with knowledge that he had obtained from the depositions taken pursuant to the order of the bankruptcy judge, filed a separate action against many of the same defendants who are named in this suit. That suit is entitled *Starns v. Avent*, and is pending before this Court bearing docket number CA 86-86-B.

After Mr. Collins had taken all of the 2004 depositions authorized by the bankruptcy court, he then amended his suit and then for the *first time* served the defendants with the original and amended complaints. The defendants argue that the procedure used by Mr. Collins in obtaining the information from the defendants in depositions without advising them of the fact that a lawsuit had been filed amounted to an "ambush" and had the effect of circumventing Rules 27 and 30 of the Federal Rules of Civil Procedure. Therefore, these defendants argue that because Mr. Collins' actions constituted an abuse of process, the suit should be dismissed or, in the alternative, the defendants argue that the depositions should be impounded.

While this Court *strongly* condemns the practice used by Mr. Collins in securing the depositions of the defendants in this case, and while this Court shall *never* condone nor tacitly approve such conduct, the Court does not believe that the action of the plaintiff amounted to an abuse of process. The plaintiff's actions may not constitute an abuse of process, but they clearly constitute a violation of Rules 27 and 30 of the Federal Rules of Civil Procedure. The record is clear that plaintiff took no action to secure the deposition of a party prior to the time a suit was filed in accordance with the provisions of Rule 27. It is also clear that the plaintiff failed to comply with the provisions of Rule

30(a) of the Federal Rules of Civil Procedure insofar as giving proper notice of the deposition and complying with the thirty day time limitation set forth in the rule. Not only did the defendants not receive any notice, they were not given the opportunity to have counsel present nor were they given the opportunity to cross-examine the parties whose depositions were taken. The record also reveals that the parties whose depositions were taken were not given notice of the purpose of the depositions by the trustee. The application for the order which set forth the reasons for the 2004 depositions was not given to any of the parties whose depositions were taken.

The plaintiff had a clear and unfair advantage over the defendants during the taking of the 2004 depositions. While the Court *reluctantly* declines to dismiss this case because of the manner in which the depositions were taken, the Court does believe that it would be in the interest of justice that the parties in this suit not be allowed to use the depositions taken pursuant to the 2004 order granted by the bankruptcy judge. Not only will the depositions be impounded, but the depositions shall not be used by any party in this case for any purpose. In addition, all summaries of the depositions and notes taken during the depositions must also be submitted to the Court. Any violation of this order shall constitute a contempt of this Court's order and appropriate sanctions shall be imposed by the Court for any violation of this order.

While the Court has clearly expressed its dissatisfaction at the manner in which the depositions were taken in this case, the Court expresses no opinion on the alleged violations of the Louisiana Code of Professional Responsibility involved in this case or other ethical

> violations. The Court's role is to preside in this case and ensure that all of the litigants receive a fair and impartial trial. The ethical rules and considerations raised by the manner in which the depositions were taken is better addressed to other tribunals charged with regulating the conduct of attorneys practicing law in the state of Louisiana. This Court will ensure that the parties comply with the Federal Rules of Civil Procedure and where thee [sic] has been an abuse or misuse of these procedural rules, the Court will take appropriate actions. This Court will leave to other parties and tribunals the obligation to carry out the responsibilities of their respective offices.

The Court now turns to a discussion of the legal issues involved in defendants' motion for summary judgment.

II. Was the order issued by the bankruptcy court on February 13, 1985 a final judgment?

After conducting an evidentiary hearing on February 13, 1985, the bankruptcy court issued an order which authorized and confirmed the sale of Hendrick's stock in Stingray. The first issue the Court must resolve is whether the February 13, 1985 order was a final judgment. Neither Hendrick nor any other party appealed the February 13, 1985 order in accordance with Bankruptcy Rule 8001. Defendants contend that this order was a final judgment which can only be attacked by an appeal or by a motion filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.[7]

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[7] Bankruptcy Rule 9024 makes Rule 60(b) applicable to bankruptcy proceedings.

Bankruptcy Rule 9021 requires that every judgment "be set forth on a separate document." The order of February 13, 1985 which was prepared by the attorney for the trustee and signed by Judge Wesley Steen, complies with Rule 9021. The Court finds that the order signed by the bankruptcy judge on February 13, 1985 is a final judgment. Thus, plaintiff's contention that the order was interlocutory in nature is without merit.

The February 13, 1985 order authorized the sale of "all of the estate's shares of stock in PFC, Inc., said sale to be free and clear of all liens, claims, and encumbrances, including any and all alleged co-owner's rights or right of first refusal of Judith Polk Hendrick."[8] Thus, the order of February 13, 1985 was an authorization to sell property of the bankrupt's estate. An order issued by the bankruptcy court authorizing the sale of part of the bankrupt estate is a final judgment[9] even though the order neither closes the bankruptcy case nor disposes of any claim.[10]

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[8] See pp. 9-10 of this opinion.

[9] *See, e.g.*, In re Sax, 796 F.2d 994, 996 (7th Cir. 1986). (" 'Final' is interpreted more liberally in bankruptcy cases than in other federal cases. In Re Barker, 768 F.2d 191, 193 (7th Cir. 1985) . . . Orders approving or failing to approve a sale of debtor's property are considered final decisions and are immediately appealable.")

[10] 28 U.S.C. § 158(d); Met-L-Wood Corp. v. Pipin, 861 F.2d 1012, 1016 (7th Cir. Nov. 8, 1988) (An order which authorized the sale of the debtor's property "is appealable as a final order under 28 U.S.C. § 158(d)"); *See also* In re Sax, 796 F.2d 994 (7th Cir. 1986); In re Delta Services Industries, 782 F.2d 1267 (5th Cir. 1986); Southmark Properties v. Charles House Corp., 742 F.2d 862 (5th Cir. 1984); I. Collier on Bankruptcy § 3.03 at 3-156 (5th ed. 1986).

Thus, in *Southmark Properties v. Charles House Corp.*, 742 F.2d 862 (5th Cir. 1984)[11] the Court stated:

> There is no real doubt that the district court possessed jurisdiction to authorize and approve a trustee's sale. *See* 11 U.S.C. §§ 515, 516(3).
>
> That the district court's order authorizing the sale of The Charles House property and judgment confirming the sale and passage of title to Southmark operated as "a final judgment on the merits" is evident.

742 F.2d at 870.

Having concluded that the February 13, 1985 order constituted a final judgment, the Court must now determine whether Rule 60(a) applies under the facts of this case.

(a) Does Rule 60(a) apply under the facts of this case?

Plaintiff has filed a motion under Rule 60(a) of the Federal Rules of Civil Procedure to correct the February 13, 1985 order to reflect the bankruptcy judge's alleged intention to allow the plaintiff to attack the stock sale through a fraud suit. Plaintiff further argues that if the Court does correct the order to permit fraud suit, the February 13, 1985 order cannot be considered a final

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[11] *See also,* Childress v. Aurora Nat'l Bank (In re Childress), 851 F.2d 926 (7th Cir. 1988); Bayer v. Nicola (In re Bestmann), 720 F.2d 484 (8th Cir. 1983); Sulmeyer v. Karbach Enterprises (In re Exennium, Inc.), 715 F.2d 1401 (9th Cir. 1983); Gross v. Russo (In re Russo), 762 F.2d 239 (2d Cir. 1985).

judgment.[12] Rule 60(a) provides the procedure which must be followed to obtain relief for clerical mistakes in a judgment:

> (a) Clerical Mistakes: Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Thus, the issue before the Court is whether the alleged discrepancy between Judge Steen's intentions, the court's minute entry and his written order can be classified as a "clerical mistake" within the meaning of Rule 60(a). Plaintiff relies on two cases to support his contention that a clerical mistake was involved in this case.[13] However, the Fifth Circuit Court of Appeals has taken a more narrow view of what constitutes a clerical mistake. In *Harcon Barge Co. v. D & G Boat Rentals*, 784 F.2d 665, 668-69 (5th Cir.) (en banc) *cert. denied*, 479 U.S. 930, 107 S. Ct. 398, 93 L.Ed.2d 351 (1986) the court stated:[14]

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[12] Bankruptcy Rule 9024 adopts Rule 60 of the Federal Rules of Civil Procedure. It must be noted that no request was filed with the bankruptcy court under Bankruptcy Rule 9024 or Rule 60 of the Federal Rules of Civil Procedure to correct the judgment.

[13] Blanton v. Anzalone, 813 F.2d 1574 (9th Cir. 1987), and Allied Materials Corp. v. Superior Prods. Co., 620 F.2d 224 (10th Cir. 1980).

[14] *See also*, Jones v. Anderson-Tully Co., 722 F.2d 211, 212 (5th Cir. 1984); Trahan v. First National Bank, 720 F.2d 832,

(Continued on following page)

The scope of Rule 60(a) is, as we have noted, very limited. In *Dura-Wood Treating Co., Division of Roy O. Martin Lumber Co. v. Century Forest Industries, Inc.*, the court set out these limits:

> Rule 60(a) finds application where the record makes apparent that the court intended one thing but by merely clerical mistake or oversight did another. Such a mistake must not be one of judgment or even of misidentification, but merely of recitation, of the sort that a clerk or amanuensis might commit, mechanical in nature. . . . If of this sort, it matters not whether the magistrate committed it – as by mistakenly drafting his own judgment – or whether his clerk did so . . . the law does not regard such trifles. In such instances the judgment can be corrected to speak the truth. (Citations omitted).

Thus, it is proper to use Rule 60(a) to correct a damages award that is incorrect because it is based on an erroneous mathematical computation, whether the error is made by the jury or by the court. *"Errors of a more substantial nature are to be corrected by a motion under Rule 59(e) or 60(b)."* Correction of an error of "substantive judgment," therefore, is outside the reach of Rule 60(a). (Emphasis supplied)

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833-34 (5th Cir. 1983), judgment of district court aff'd, 747 F.2d 990 (5th Cir. 1984) (per curiam). *See also*, In re Galiardi, 745 F.2d 335, 337 (5th Cir. 1984); Warner v. City of Bay St. Louis, 526 F.2d 1211, 1212 (5th Cir. 1976), judgment of district court aff'd, 552 F.2d 583 (5th Cir. 1977) (per curiam); West Virginia Oil & Gas Co. v. George E. Breece Lumber Co., 213 F.2d 702, 705 (5th Cir. 1954).

Furthermore, in *Warner v. City of Bay St. Louis*, 526 F.2d 1211, 1212 (5th Cir. 1976), the Fifth Circuit refused to treat the amount of interest to be paid on a judgment as a clerical error. The Court stated that "errors that effect substantial rights of the parties are outside the scope of Rule 60(a)." *Id.* at 1212.

The error sought to be corrected by the plaintiff in this case is more than a clerical error. The correction requested by the plaintiff is too substantial in nature to fall within the provision of Rule 60(a). Furthermore, a review of the transcript of the February 13, 1985 hearing fails to make it absolutely clear that the judgment should be corrected in the manner sought by the plaintiff. The transcript does reflect the intent of all parties to sell the Stingray stock which belonged to Hendrick. The record also reflects the suspicion a number of parties had regarding the stock sale, including the attorneys for the trustee and the debtor. However, it is not certain from the record what type of action, if any, was being reserved to the trustee.[15] It would certainly be very difficult for this Court to determine what specific rights, if any, were reserved from a review of the transcript in this case. The Court would also be required to interpret the meaning of the phrase "free and clear of liens, claims and encumbrances" which was included in the bankruptcy judge's order of February 13, 1985.

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[15] *See, e.g.*, transcript of hearing of February 13, 1985, pp. 7, 8, 9, 42, 43.

None of the parties moved to have the bankruptcy court correct the judgment under Rule 59(e)[16] within ten days after the judgment was entered. Furthermore, no one moved to stay the order authorizing the sale of the stock pending any appeal or other review by the bankruptcy court or the district court. In fact, no one appealed the order of the bankruptcy court.

If this Court were to accept the broad interpretation of "clerical mistakes" advanced by the plaintiff, the Court's decision would not only be in conflict with the Fifth Circuit's interpretation of Rule 60(a), but would also be required to ignore an established line of jurisprudence which holds that a court's written words, and not evidence of its intentions, control the meaning of its judgment. In *Murdaugh Volkswagen, Inc. v. First National Bank*, 741 F.2d 41, 44 (4th Cir. 1984) the court stated:

> Courts must speak by orders and judgments, not by opinions, whether written or oral, or by chance observations or expressed intentions made by courts during, before or after trial, or during argument. When the terms of a judgment conflict with either a written or oral opinion or observation, the judgment must govern.
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> *See also* Richmond, Fredericksburg and Potomac R.R. Co. v. Brotherhood of Maintenance of Way Employees, 795 F.2d 1167 (4th Cir. 1986) (Widener, J., dissenting) ("If the order of the court is contrary to an observation made by the judge in the transcript, . . . it is the order which controls."); Duffer v. American Home Assurance

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[16] Rule 59(e) provides: "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

> Co., 512 F.2d 793, 799 (5th Cir. 1975) ("We hold that the trial court's oral expression of future intention . . . was not a judgment . . . "); Segars v. Atlantic Coast Line R.R. Co., 286 F.2d 767, 770 (4th Cir. 1961) ("It is the formal order that determines the action of the court rather than some chance statement or observation made by the Judge during the course of oral arguments.").

Therefore, the Court finds that the order signed by the bankruptcy court on February 13, 1985 which authorized the sale of plaintiff's stock in Stingray was a final judgment. The Court further finds that plaintiff's motion to correct the judgment under Rule 60(a) of the Federal Rules of Civil Procedure is without merit and is denied.

II. Is a Rule 60(b) motion the sole method of attacking the February 13, 1985 order of the bankruptcy court?

The plaintiff filed this suit on February 12, 1986. The original complaint asserted claims under RICO, the 1934 Securities Act, § 10b-5 and various state laws. On November 6, 1987, approximately thirty-three months after the bankruptcy court issued its order approving the sale of Hendrick's Stingray stock, the plaintiff amended his complaint to seek rescission of the stock sale. A review of the pleadings and pretrial order filed in this case reveals that plaintiff has never filed a motion under Rule 60(b) with either the bankruptcy court or this Court.

Defendants contend the plaintiff's sole remedy to collaterally attack the February 13, 1985 order is under Rule 60(b) of the Federal Rules of Civil Procedure. Since plaintiff failed to timely file a Rule 60(b) motion, defendants argue that plaintiff's suit should be dismissed.

In response to defendants' motion for summary judgment, plaintiff argues that he may file a separate suit under federal and state laws to recover damages for the alleged fraud committed by the defendants in connection with the stock sale. Plaintiff further contends that his second amended complaint which seeks a rescission of the sale should be treated as a Rule 60(b) motion which relates back to the time his original complaint was filed. Finally, plaintiff contends that because the defendants' conduct constitutes fraud on the court, the time for filing a motion under Rule 60(b) has not run.

Plaintiff's contentions are without merit. The Court finds: (1) plaintiff's sole remedy to contest the February 13, 1985 order of the bankruptcy court under the facts of this case is under Rule 60(b) motion; (2) plaintiff has not filed a Rule 60(b) motion; (3) the second amended complaint cannot be treated as a Rule 60(b) motion;[17] (4) even if the second amended complaint is treated as a Rule 60(b) (3) motion, the one year period to file such a motion has expired and cannot be extended by the court; and, (5) even if the second amended complaint is treated as a Rule 60(b) motion to reopen the judgment for fraud on the court, the motion is without merit because there was no fraud committed on the bankruptcy court.

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[17] It must be noted that not all the parties to the bankruptcy action who would have a right to respond to a Rule 60(b) (3) motion are parties to this suit, including the creditors who received the money and the trustee. Furthermore, the second amended complaint only seeks a rescission of the stock sale, but is silent on reinstating the cause of action which was filed against and by Hendrick in South Carolina and was dismissed by the February 13, 1985 order.

Rule 60(b) authorizes a court to grant relief from a final judgment, order or proceeding to a party upon a proper showing and just terms. The rule provides in pertinent part:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.: On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of the adverse party; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, . . . or to set aside a judgment for fraud upon the court.

Plaintiff could and should have attacked the final judgment of the bankruptcy court by way of a timely filed motion under Bankruptcy Rule 9024 or under Rule 60(b) in this Court. The issue confronting this Court is whether any other remedies are available to the plaintiff to challenge the validity of the final judgment of the bankruptcy court.

The precise issues involved before this Court were recently considered by the Seventh Circuit Court of Appeals in *Met-L-Wood Corp. v. Pipin*. In *Met-L-Wood*, the plaintiff filed for bankruptcy on December 6, 1984. Four days later, the bankruptcy judge ordered the sale of Met-L-Wood's bulk assets. Six months after the bankruptcy

court approved the sale, Met-L-Wood's Chapter 11 case was converted to a Chapter 7 liquidation. Thereafter, the trustee appointed by the court investigated the circumstances surrounding the judicial sale. The newly appointed trustee "armed with what he believed to be compelling evidence of fraudulent character of the judicial sale" filed two actions: (1) on April 25, 1986, the trustee filed a suit charging fraud under RICO, other statutes and state law; and, (2) in July of 1986, the trustee filed a Rule 60(b) (3) motion with the bankruptcy court to reopen the bankruptcy proceedings because of the alleged fraud in connection with the sale.

The parties and facts involved in the *Met-L-Wood* case were similar to the parties and facts involved in the case now before the Court.[18] The plaintiff in *Met-L-Wood* was

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[18] The Seventh Circuit Court of Appeals summarized the pertinent facts in *Met-L-Wood* as follows:

> Judge McCormick appointed an interim trustee pending the creditors' election of a permanent one. They elected Gekas on August 6. Gekas investigated the circumstances surrounding the judicial sale and eventually decided that there had been skullduggery of two kinds. First, Judge McCormick, who in an unrelated case had been reprimanded for an ex parte contact with a firm appearing before him (see In re Wisconsin Steel Corp., 48 B.R. 753 (N.D. Ill. 1985); See also In re X-Cel, Inc., 61 B.R. 691 (N.D. Ill. 1986), had Gekas believed, agreed to the December 10 hearing on the ex parte urging of a law firm representing Met-L-Wood (the Coffield firm – oddly not the firm that had represented Met-L-Wood in the bankruptcy proceeding). Gekas's second charge was that the bidding had been rigged, in a scheme orchestrated by

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the former debtor in the bankruptcy proceeding whose property was sold. The defendants were lawyers who had represented an undisclosed buyer, a party who acted as a "shill" for the undisclosed buyer, and the undisclosed buyer. The complaint alleged improper conduct on the part of the bankruptcy judge and fraud on the court because of the improper conduct of the bankruptcy judge and the lawyers who were sued in the RICO action. The court in *Met-L-Wood* dismissed the Rule 60(b) (3) motion on the grounds that it was not timely filed within the one-year period set forth in the rule. A second judge dismissed the fraud suit on the basis of collateral estoppel, based on the order of the bankruptcy court confirming the sale. The Seventh Circuit affirmed both decisions.

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the Coffield firm to bail out Pipin and the secured creditors and leave the unsecured creditors out in the cold: Smith was a shill for Pipin, and his bid was phony because Pipin didn't have $800,000 with which to make good on it if it was accepted. How this might have helped Pipin and the secured creditors is unclear, but maybe the idea is that Smith's bid deterred others from bidding. Thompson, Gekas charged, was also in cahoots with Pipin – he was planning to sell him back the Sea-Lok operation, the only profitable part of Met-L-Wood's business. The unsecured creditors had insufficient notice and so weren't able to make their own bid or arrange for independent bidders. (We emphasize that all this is Gekas's version of the events; it is not established truth.) After the sale, Thompson did sell Pipin the Sea-Lok operation, for $120,000, and he in turn granted a security interest in the operation to Met-L-Wood's two principal secured creditors. *Met-L-Wood*, 861 F.2d at 1015-16.

In dismissing the RICO action, the Seventh Circuit stated that no appeal was taken from the order authorizing the sale of the debtor's property. Thus, res judicata applied to bar the parties to the bankruptcy proceeding from collaterally attacking the final judgment of the bankruptcy court which authorized the sale of the debtor's property. The court stated:

> No appeal from Judge McCormick's order was taken however; and after the time for appeal had lapsed, the order could not be attacked in a new lawsuit brought by a party to the sale proceeding or by a successor to that party or by anyone else so far identified with such a party as to be classified as being in privity with him; such a suit would be barred by res judicata. The only other remedy would be a motion to vacate the judgment under Rule 60(b). . . . The unsecured creditors who appeared at the two hearings before Judge McCormick and urged him first to allow bids for Met-L-Wood's assets to be solicited and then to approve Thompson's bid were parties to the sale proceeding. They are therefore barred by res judicata from bringing a lawsuit to nullify the sale. (Bringing the suit under RICO could make no difference. RICO is many things, but it is not an exception to res judicata. Harris Trust & Savings Bank v. Ellis, 810 F.2d 700, 705-06 (7th Cir. 1987).)
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> A sale under section 363(b) that fails to comply with the notice or hearing requirements of the statute and the applicable bankruptcy rules is invalid and may be set aside on appeal. But it is not void. This is shown by the fact that even a reversal on appeal of the order authorizing or confirming the sale will not affect the sale's validity if the buyer was acting in good

faith and the sale had not been stayed pending appeal. 11 U.S.C. § 363(m). That provision is not applicable here, because the purchaser (Thompson) and everyone else involved in the sale (except the representative of the unsecured creditors!) is charged with fraud. But it expresses a highly relevant concern with the importance of finality in judicial sales in bankruptcy. *See also* In re Sax, *supra*, 796 F.2d at 998. Gekas's suit does not seek to rescind the sale. But by seeking heavy damages from the seller, the purchaser, the purchaser's purchaser (Pipin), a law firm involved in the transaction, and the secured creditors that benefited from the sale, the suit is a thinly disguised collateral attack on the judgment confirming the sale. This may be done only by the route provided for collateral attacks on judgments. After the time for appeal had run, the validity of the sale was established, even against nonparties to the sale proceeding.

* * *

Now that there is a Rule 60(b), expressly applicable to bankruptcy as we have seen, the inherent power seems otiose; and although the cases continue to refer to it, they define it in terms of Rule 60(b). *See*, e.g., In re Chung King, Inc., 753 F.2d 547, 549-50 (7th Cir. 1985). As a natural development from those cases, as well from the text of Bankruptcy Rule 9024, which applies Rule 60(b) to bankruptcy proceedings, we hold that confirmed sales – which are final judicial orders – can be set aside only under Rule 60(b). 861 F.2d at 1016-18.

The Seventh Circuit issued a similar ruling in *Metlyn Realty Corp. v. Esmark*, 763 F.2d 826 (7th Cir. 1985). In *Metlyn*, securities were sold pursuant to a court order. Thereafter, a Rule 60(b) motion was filed to reopen the

judgment on the ground that the defendant had withheld certain information from the court at the time the sale was approved. The court held that Rule 60(b) of the Federal Rules of Civil Procedure and not the securities laws was the sole means of attacking the judgment.[19]

> The arguments based on the securities laws do no better. The securities laws doubtless require truthful statements and penalize fraud, as the objectors emphasize, but this does not imply that they authorize the reopening of judgments or override the standards of Rule 60(b). The securities laws were designed to handle transactions in markets, in which the parties might have too little incentive to reveal information and might find it too easy to tell lies or half-truths. They do not apply expressly to misstatements in the course of litigation, and they were not designed to regulate the conduct of trials.
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> The existence of a private right of action depends on the meaning of the legislation, and it is quite farfetched to suppose that Congress meant to change the rules of civil litigation when it enacted the Securities Act of 1933 and authorized the SEC to promulgate Rule 10b-5 under the '34 Act.
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> * * *
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> The principles developed in the application of Rule 60(b) are tuned to the benefits and burdens of reopening judgments. *We conclude that these principles are the sole means of attack on final*

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[19] *Id.* at 833-34 (emphasis added). *See also,* Southmark Properties v. Charles House Corp., 742 F.2d 862 (5th Cir. 1984); Harris Trust and Savings Bank v. Ellis, 810 F.2d 700 (7th Cir. 1987).

> *civil judgments*. The fact that there are rules for securities cases on the merits – and, we suppose, particular rules for just about every substantive category of litigation in federal courts – is irrelevant. The legal system has devised ways of channeling attacks on final judgments back through a single device specially designed for the purpose of reopening. The principles of claim and issue preclusion cut off one kind of attack; the rule that witnesses are absolutely immune from civil liability for their testimony, *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983), cuts off another; we conclude that Congress did not mean to inject the securities laws into a branch of judicial administration from which other competing principles have been carefully removed.

There are strong policy reasons for concluding that Rule 60(b) is the sole means of attack on final civil judgments – finality of civil judgments.[20] Final judgments in civil cases and bankruptcy cases fix the rights of the parties.[21] Thus, final judgments should only be reopened

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[20] In *Metlyn*, 763 F.2d at 830, the court noted:

> There are good reasons for the stringent limits on reopening a final judgment. The rule that the final judgment governs the future induces the parties to focus all of their efforts in a single proceeding. If they know that the judgment will establish their rights once and for all, they will bring to bear the information and energies necessary to produce an informed decision. If they believe that they can have a second try, they are more likely to skimp the first time around, and as a result the judicial process will become less accurate.

[21] Abraham v. Aguilar (In re Aguilar), 861 F.2d 873-874 (5th Cir. 1988) (wherein the court recognized "the important interest in the finality of judgments in a bankruptcy case).

for the extraordinary reasons set forth in Rule 60(b).[22] This is particularly so in in rem proceedings under § 363 of the Bankruptcy Code. A sale under § 363 transfers property rights which are good against the world. Both parties and non-parties to the bankruptcy proceeding are directly affected by such a sale. In some instances the court is required to act swiftly and decisively. This point was made amply clear in *Met-L-Wood*, 861 F.2d at 1017, 1019:

> We are not just invoking legal theories sanctified by Latin tags. The determining considerations are pragmatic. Often, once a petition for bankruptcy is filed, keeping the bankrupt in operation is difficulty [sic]. Suppliers and customers, fearing interruption of service, may shy away and creditors be reluctant to advance fresh credit, even though such credit carries a high priority in bankruptcy. The bankrupt may be shunned like a leper. Because of these possible consequences of bankruptcy, it may make sense – not least from the creditors' standpoint – to shift the bankrupt's assets to another owner as quickly as possible, so that the business can continue in other hands than the bankrupt's, free of the

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[22] This Court has previously decided a case in which the plaintiffs filed a separate independent suit to set aside the desegregation order issued in the East Baton Rouge Parish School case. In Baier v. Parker, 523 F.Supp. 288, 290 (M.D. La. 1981) this Court stated:

> Whatever the plaintiffs have styled their action, plaintiffs' suit is nothing more than a horizontal appeal taken to a district court of another district court's decision and of a decision rendered by an appellate court. Such attempts to deliberately bypass the proper channels for appellate review shall not be tolerated or condoned by this Court.

> stigma and uncertainty of bankruptcy. That is what the creditors told Judge McCormick should be done with the assets of Met-L-Wood. They thought that those assets and therefore their claims against them would be more valuable if the assets were sold, and sold pronto. He agreed.
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> * * *
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> The result may seem a harsh one; it may seem to illustrate the penchant of courts (as some would see it) to work injustice through technicalities. But insistence on tight deadlines is not always the sign of a Prussian soul. Unless bankruptcy sales are final when made, rather than subject to being ripped open years later, high prices will not be offered for the assets of bankrupt firms – and the principal losers (pun intended) will be unsecured creditors.

Thus, the Court finds that the sole method to attack the stock sale ordered by the bankruptcy court on February 13, 1985 under the facts of this case is a motion under Rule 60(b) of the Federal Rules of Civil Procedure. The finality of the February 13, 1985 order precludes any other action brought by the plaintiff.

IV. A. Did the plaintiff file a Rule 60(b) motion?

The Court must now determine whether plaintiff filed a 60(b) motion. Plaintiff has not filed a formal motion under Rule 60(b) in either the bankruptcy court or this Court. In fact, the plaintiff has never even mentioned Rule 60(b) in the original or three amended complaints, in the pretrial order, or in any amendment to the pretrial order. The only mention of Rule 60(b) up to the time the final pretrial order was filed was made by the defendants

who sought to have the suit dismissed because of plaintiff's failure to file a Rule 60(b) motion.

On November 6, 1987, plaintiff filed his second amended complaint which sought a rescission of the stock sale of February 13, 1985. Plaintiff now seeks to have the Court treat this second amended complaint as a Rule 60(b) motion.

The Court recognizes the general rule that pleadings in federal court, including prayers for relief, should be liberally construed.[23] However, the question the Court must determine is what relief was plaintiff actually seeking when he filed his second amended complaint. The Court assumed after receiving the motion to amend and the proposed amended complaint that plaintiff was seeking a rescission of a sale under state law.[24] If the plaintiff intended to treat his second amended complaint as a Rule 60(b) motion, rather than as a claim for rescission under state law, this Court would not have permitted the second amended complaint to be filed for a number of resons.[25] The Rule 60(b) motion should have been filed in the bankruptcy court, albeit this Court could have withdrawn

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[23] While pleadings should be liberally construed, plaintiff asks this Court to treat his pleading as a motion.

[24] The Court was aware that other pendent state law claims had already been asserted by the plaintiff in his original complaint.

[25] The Court has discretion to grant or deny a motion to amend a complaint under Rule 15(a) of the Federal Rules of Civil Procedure. As will be noted later in this opinion, an amended complaint is not a proper vehicle to bring a Rule 60(b) motion, and, even if it was, the request was not timely filed under Rule 60(b).

the motion. Not all of the parties to the bankruptcy proceeding are parties before this Court. Indeed, neither the creditors to whom proceeds from the stock sale were paid nor all of the parties in Collins' South Carolina suit are before this Court. It is also important to note that the trustee is no longer a party to this action and has abandoned this suit and any recovery therein from Hendrick's bankrupt estate. Had a Rule 60(b) motion been timely and properly filed with the bankruptcy court, the trustee and creditors would have stood to reap any financial benefits which would have resulted from a recovery in a RICO, 10b-5 or other fraud related suit. The parties' interest in the South Carolina suit could have also been protected if the Rule 60(b) motion had been timely filed. However, if the Court now treats plaintiff's second amended complaint as a Rule 60(b) motion, only Hendrick would stand to gain from his tardy and unexcused failure to follow the Federal Rules of Civil Procedure.

Furthermore, this Court should not be required to assume or guess what motion or other relief a party is seeking. A party should properly identify his pleadings, motions, and the relief sought.[26] The United States

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[26] *See, e.g.*, Rule 7(b) of the Federal Rules of Civil Procedure which provides in pertinent part:

> (b) Motions and other papers.
>
> (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall set forth with particularity

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Supreme Court has emphasized this fact in *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 50-51, 73 S. Ct. 125, 127, 97 L.Ed. 77 (1952). The respondent in the *Johnson* case sought to have its motion to set aside the verdict treated as a motion for judgment in its favor or a motion for a new trial. The Supreme Court refused to do so, stating:

> Although this respondent made several motions it did not as the rule requires move within ten days after verdict "to have judgment entered in accordance with his [its] motion for a directed verdict". We are told, however, in respondent's brief that its motion to set aside the verdict "was intended to be a motion for judgment in its favor or for a new trial" and that "[o]bviously respondent did not merely want the verdict to be set aside but wanted the relief that invariably follows such a setting aside on the grounds urged: a judgment in its favor or a new trial." The defect in this argument is that respondent's motions cannot be measured by its unexpressed intention or wants. Neither the trial judge nor the Court of Appeals appears to have treated the motion to set aside the verdict as asking for anything but that. And surely petitioner is not to have her opportunity to remedy any shortcomings in her case jeopardized by a failure to

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the grounds therefor, and shall set forth the relief sought . . .

(2) The rules applicable to captions and other matters of form of pleadings apply to all motions . . .

See also Rule 10 which provides that "[e]very pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a)."

> fathom the unspoken hopes of respondent's counsel. Respondent's motion should be treated as nothing but what it actually was, one to set aside the verdict – not one to enter judgment notwithstanding the verdict.

A similar result was reached by the Seventh Circuit in *Hulson v. Atchison, T. & S.F. Ry. Co.*, 289 F.2d 726, 729 (7th Cir.), *cert. denied*, 368 U.S. 835, 82 S. Ct. 61, 7 L.Ed.2d 36 (1961) wherein the Court stated:

> The 10 day limit for filing a motion for new trial fixed in Rule 59(b) cannot be enlarged under Rule 6(b), except as provided in subsection (c) of Rule 59, and such exception has no application to the situation before us here.
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> * * *
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> In order to avoid the application of the foregoing rules, plaintiffs urge this court to treat the motion for extension "to amend their motion for a new trial," served on June 16, 1960, as a motion for a new trial. The trial court did not err in rejecting this contention. Plaintiffs' motion "cannot be measured by its unexpressed intention or wants." It "should be treated as nothing but what it actually was," one to amend a motion for a new trial which was not on file and was never timely filed. Johnson v. New York, N.H. & H. R. Co., supra, 344 U.S. at page 51, 73 S.Ct. at page 127; John E. Smith's Sons Co. v. Lattimer Foundry & Mach. Co., D.C.M.D.Pa. 1956, 19 F.R.D. 379, 381, and cases cited therein, affirmed 3 Cir., 1956, 239 F.2d 815.

Thus, the Court concludes plaintiff has not filed a Rule 60(b) motion. The Court further finds that if the plaintiff seeks to have his second amended complaint treated as a Rule 60(b) motion, the Court hereby vacates and sets aside its prior order allowing the amendment.

The Court, in granting the amendment, intended to grant plaintiff leave to file an amended complaint, not a Rule 60(b) motion.

B. Assuming arguendo the second amended complaint is a Rule 60(b) motion, can the amendment relate back to the original complaint?

Even assuming plaintiff's second amended complaint could be considered a Rule 60(b) motion, the Court must determine if the amendment can relate back to the original complaint. If the amendment can relate back, the alleged Rule 60(b) motion would have been filed within a year.[27] Plaintiff contends that the motion relates back under Rule 15(c) of the Federal Rules of Civil Procedure, which provides in pertinent part:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

Rule 15(c) allows relation back of claims and defenses asserted in pleadings but does not allow relation back where motions are filed. Rule 7 carefully distinguishes pleadings from motions.[28] The Fifth Circuit and other

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[27] Of course, the Court would still have to determine if the motion was timely filed under Rule 60(b). This issue will be considered, *infra*.

[28] **Rule 7. Pleadings Allowed; Form of Motions**

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as

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courts have specifically ruled that a motion is not a pleading for purposes of Rule 15(a).[29] Since a motion cannot be considered as a pleading, a Rule 15(a) amendment cannot be used for bringing a motion and Rule 15(c)

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such; an answer to a cross-claim, if the answer contains such a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) Motions and Other Papers.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) All motions shall be signed in accordance with Rule 11.

[29] McLellan v. Mississippi Power & Light Co., 526 F.2d 870, 872 n.2 (5th Cir. 1976), modified on reh'g on other grounds, 545 F.2d 919 (5th Cir. 1977). *See also* McDonald v. Hall, 579 F.2d 120 (1st Cir. 1978); Fuhrer v. Fuhrer, 292 F.2d 140 (7th Cir. 1961); United States v. 64.88 Acres of Land, 25 F.R.D. 88 (W.D. Pa. 1960); Wright & Miller, Federal Practice and Procedure: Civil § 1475.

cannot be used to relate the motion back to the date of filing the original pleading.[30]

C. What effect does Rule 6(b) of the Federal Rules of Civil Procedure have on the time in which a rule 60(b) motion may be filed?

Rule 6(b) of the Federal Rules of Civil Procedure presents a serious impediment to plaintiff's request that the Court allow his second amended complaint to be treated as a Rule 60(b) motion which relates back to his original complaint. Rule 6(b) provides that a court "may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), *60(b)*, and 74(a), except to the extent and under the conditions stated in them." (emphasis added). Rule 60(b) has no provision for relation back and contains a specific prohibition against extending the time for filing certain motions, including a Rule 60(b) motion. The Fifth Circuit in *Stacy v. Williams*, 446 F.2d 1366 (5th Cir. 1971) was confronted with a similar issue. In *Stacy*, a judgment was entered on December 1, 1969 which required the defendants to pay costs of the suit. On December 9, 1969, the plaintiffs filed a bill of costs which made no reference to attorney's fees. Two months later, plaintiffs filed a motion for leave to amend the bill of costs and for allowance of attorney's fees. The district court refused to consider the amended motion

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[30] For a contrary view, see Hale v. Ralston Purina Co., 432 F.2d 156, 159 (8th Cir. 1970), which implied that a Rule 60(b) motion could relate back under Rule 15(c). The court in *Hale* did not, however, allow relation back under the facts of that case.

because it was filed more than ten days after the judgment. The Fifth Circuit affirmed the decision of the district court and refused to allow the amended motion to relate back to the timely filed motion.

A similar result was reached in *Brest v. Philadelphia Transportation Co.*, 24 F.R.D. 47 (E.D. Pa. 1959). In *Brest*, a judgment was entered on October 24, 1958. Plaintiffs filed a motion for a new trial on October 29, 1958, reserving the right to set forth additional reasons in the future. Plaintiffs filed additional reasons on November 26 and again on December 31, after the 10 day period allowed under 59(b) had passed. The district court refused to consider the additional reasons, citing the 6(b) prohibition against enlargement of time for such a motion.

Thus, it is clear that the courts consider the time periods set forth in Rules 50(b) and (c)(2),[31] 52(b),[32] 59(b),

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[31] Nugent v. Yellow Cab Co., 295 F.2d 794 (7th Cir. 1961) *cert. denied*, 369 U.S. 828, 82 S.Ct. 844, 7 L.Ed.2d 793 (1962); Hulson v. Atchinson, T. & S.F. Ry. Co., 289 F.2d 726 (7th Cir.) *cert. denied*, 368 U.S. 835, 82 S. Ct. 61, 7 L.Ed.2d 36 (1961); Mickey v. Tremco Mfg. Co., 226 F.2d 956 (7th Cir. 1955); Bass v. Spitz, 522 F.Supp. 1343 (E.D. Mich. 1981); McCarthy v. Cahill, 249 F.Supp. 194 (D.D.C. 1966).

[32] Marane, Inc. v. McDonald's Corp., 755 F.2d 106 (7th Cir. 1985); Gribble v. Harris, 625 F.2d 1173, 1174 (5th Cir. 1980); Flint v. Howard, 464 F.2d 1084 (lst Cir. 1972); Steward v. Atlantic Ref. Co., 235 F.2d 570 (3d Cir. 1956); Torockio v. Chamberlain Mfg. Co., 56 F.R.D. 82, 85 n.6 (W.D. Pa. 1972), *aff'd without opinion*, 474 F.2d 1340 (3d Cir. 1973).

(d) and(e),[33] 60(b)[34] and 74(a) to be mandatory and jurisdictional and do not permit the time periods set forth therein to be extended.[35]

The Court's conclusion in this case may seem harsh. But plaintiff chose not to appeal the order of the bankruptcy court to the district court. Plaintiff also chose not to timely file any post trial motion permitted under the Federal Rules of Civil Procedure, including Rules 52(b), 59(b) (d) (e) or Rule 60(b). Plaintiff chose instead to file the current suit. Because of hindsight, he now seeks to

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[33] Leishman v. Associated Wholesale Elec. Co., 318 U.S. 203, 63 S. Ct. 543; 87 L.Ed. 714 (1943); Myers v. Ace Hardware, Inc., 777 F.2d 1099 (6th Cir. 1985); Marane, Inc. v. McDonald's Corp., 755 F.2d 106 (7th Cir. 1985); Fairway Center Corp. v. U.I.P. Corp., 491 F.2d 1092 (8th Cir. 1974); Flint v. Howard, 464 F.2d 1084 (lst Cir. 1972); Perry v. Richardson, 440 F.2d 677 (6th Cir. 1971); Wagoner v. Fairview Consol. School Dist. No. 5, 289 F.2d 480 (10th Cir.), *cert. denied*, 368 U.S. 921, 82 S. Ct. 241, 7 L.Ed.2d 135 (1961); Steward v. Atlantic Ref. Co., 235 F.2d 570 (3d Cir. 1956); Tarlton v. Exxon, 688 F.2d 973 (5th Cir. 1982); Flores v. Procnier, 745 F.2d 338 (5th Cir. 1984), *cert. denied*, 470 U.S. 1086, 105 S. Ct. 1851, 85 L.Ed.2d 148 (1985); In re Colley, 814 F.2d 1008 (5th Cir.) reh'g denied, 818 F.2d 443 (5th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 234, 98 L.Ed.2d 193 (1987).

[34] Nyyssonen v. Bendix Corp., 356 F.2d 193 (lst Cir.), *cert. denied*, 385 U.S. 846, 87 S. Ct. 43, 17 L.Ed.2d 77 (1966); Terhune v. American Export Lines, Inc., 24 F.R.D. 70 (S.D. N.Y. 1958), aff'd 271 F.2d 127 (2d Cir. 1959); Certain-Teed Prods. Corp. v. Topping, 12 F.R.D. 406 (S.D. N.Y. 1952); Harcon Barge Co. v. D & G Boat Rentals, 784 F.2d 665 (5th Cir. 1986) (en banc); Egger v. Phillips, 710 F.2d 292, 329 (7th Cir.), *cert. denied*, 464 U.S. 918, 104 S. Ct. 284, 78 L.Ed.2d 262 (1983).

[35] *See* Wright & Miller, *Federal Practice & Procedure:* Civil 2d § 1167.

change the free, calculated and deliberate choices he has made. In *Ackermann v. U.S.*, 340 U.S. 193, 71 S. Ct. 209, 95 L.Ed. 207 (1950), the Supreme Court considered and rejected a similar request:

> Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home. His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong, considering the outcome of the Keilbar case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.

D. Assuming arguendo plaintiff filed a Rule 60(b) motion, was the motion timely filed?

Plaintiff contends that relief should be granted under Rule 60(b) in the following manner:

(a) Through an independent action to relieve plaintiff from a judgment.

(b) Because fraud was committed on the bankruptcy court.

(c) Because of the defendants' alleged fraud within the meaning of Rule 60(b)(3).

The Court will discuss each of these contentions separately.

1. Can an independent action be filed?

Rule 60(b) provides in part that this "rule does not limit the power of a court to entertain an independent

action to relieve a party from a judgment, order, or pleading".

The Eighth Circuit in *National Surety Co. v. State Bank*, 120 F. 593, 599 (8th Cir. 1903) outlined the elements of an independent action under Rule 60(b):

> (1) a judgment which ought not in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of defendant; and (5) the absence of any adequate remedy at law.

However, the parties may not use an independent action to relitigate issues between the parties.[36] In *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 79 (5th Cir. 1970), *cert. denied* 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed. 2d 793 (1970). *Bankers Mortgage*, 423 F.2d at 79, the Fifth Circuit noted:

> The independent action can not be made a vehicle for the relitigation of issues. Courts have consistently held that a party is precluded by res judicata from relitigation in the independent equitable action issues that were open to litigation in the former action where he had a fair opportunity to make his claim or defense in that action.

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[36] Furthermore, if the independent action is brought in a court other than the one that issued the original judgment, independent grounds of jurisdiction are required. *See* Wright & Miller, Federal Practice and Procedure: Civil § 2868.

An independent action is also subject to the defense of laches. Because plaintiff had a remedy under Rule 60(b)(3) and was not free of fault or negligence, the Court finds the plaintiff does not have the right to bring an independent action.[37]

2. Was there fraud on the court?

There is no time limitation to file a motion to vacate a judgment based on fraud on the court. However, a motion alleging simple fraud under Rule 60(b)(3) must be filed within one year. Thus, the issue to be determined by the Court is whether the defendants' actions constituted fraud on the bankruptcy court or simple fraud within the scope of Rule 60(b)(3). Under facts far more serious than those alleged in this case, the Seventh Circuit in *Met-L-Wood Corp. v. Pipin*, refused to find fraud on the court despite the alleged improper conduct on the part of the bankruptcy judge and attorneys. The court in *Met-L-Wood* stated:

> If a judgment is procured by fraud, it can be set aside under Rule 60(b)(3). But that route is barred to Gekas by the one-year limitation that Rule 60(b) places on motions under subsection (3). Gekas appeals to the catch-all provision, subsection (6) ("any other reason justifying relief from the operation of the judgment"), which has no time limit. We have italicized the word in subsection (6) that defeats Gekas's claim. You

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[37] Carter v. Dolce, 741 F.2d 758, 760 (5th Cir. 1984). See also the Court's prior discussion of the plaintiff's involvement in the *Collins* case, the nature and type of discovery sought, and the concern of the bankruptcy court regarding plaintiff's actions in this and the *Collins* case. Pickford v. Talbott, 225 U.S. 651, 658, 32 S. Ct. 687, 689-90, 56 L.Ed. 1240 (1912).

cannot use the catch-all provision to get around the express one-year limitation on motions based on fraud in procuring a judgment. Otherwise the limitation would be nugatory.

Rule 60(b) has, however, an express exception for "fraud upon the court." It has been, for the most part, interpreted narrowly. *See*, e.g., *In re Whitney-Forbes, Inc.*, 770 F.2d 692, 698 (7th Cir. 1985). Otherwise it would duplicate Rule 60(b)(3) – which is itself nationally construed, *see*, e.g., *Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 832-33 (7th Cir. 1985). Therefore the courts have held that, other than in patent cases, where the "fraud upon the court" doctrine has been generously interpreted because Patent Office procedures are ex parte and patent monopolies may have consequences far beyond the parties to a particular infringement proceeding, * * * the fraud must involve corruption of the judicial process itself.

* * *

To bring himself within this narrow exception to the one-year limitation in Rule 60(b) Gekas relies heavily on the alleged misconduct by Judge McCormick in participating in an ex parte contact. If there was such a contact, however, all it concerned (so far as we have been given any reason to believe) was the scheduling of a hearing. Given the rush that everyone was in and the fact that bankruptcy proceedings are normally not adversary and are handled less formally than ordinary lawsuits, it is hard to see any but a technical violation of the rules that forbid (with limited exceptions not applicable here) ex parte contacts with bankruptcy judges. *See*, e.g., Bankr. R. 9003. The fact that Judge McCormick was found to have committed a serious infraction of those rules in an unrelated case cannot bridge the gap and demonstrate fraud in

this case. Moreover, as we have stressed recently, a disciplinary violation calls for discipline, not nullification of judicial proceedings, *see Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 161, 162 (7th Cir. 1988); for nullification there must be prejudice to a party, and none has been shown here.

As for the allegations concerning the shill bidder and the secret plan to channel the Sea-Lok assets to Pipin (really one allegation – Pipin's secret involvement), we have difficulty understanding what the fuss is about. It is commonplace, and involves no impropriety, for the debtor himself to bid at a foreclosure sale. *See* 4B Collier, *supra*, 70.98 at p. 1170. Of course it would be improper for Pipin, controlling Met-L-Wood as he did, to use his control to walk off with its principal assets for a song, shucking off the unsecured creditors in the process. That would violate the fiduciary obligation that Pipin, controlling the debtor in possession, owed Met-L-Wood's creditors. * * * This would be fraud against the creditors, to be sure, but we do not see how it could be thought fraud against the court without erasing the distinction between two concepts that Rule 60(b) carefully separates. Gekas's Rule 60(b) motion was properly dismissed as untimely.[38]

In Wright & Miller, *Federal Practice and Procedure: Civil § 2870*, the author discusses the difference between fraud upon the court and fraud under Rule 60(b)(3):

A number of courts have accepted the suggestion of a distinguished commentator that "fraud upon the court" is fraud that "does, or attempts to, defile the court itself," or that is "perpetrated by officers of the court so that the

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[38] *Met-L-Wood*, 861 F.2d at 1018-19.

judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication."

* * *

Any fraud connected with the presentation of a case to a court is a fraud upon the court, in a broad sense. That cannot be the sense in which the term is used in the final saving clause of Rule 60(b). The remedy for most cases of fraud must continue to be by motion under Rule 60(b)(3) or by an independent action, subject to the procedural limitations applicable to those remedies. The draftsmen must have conceived of "fraud upon the court," as they used that phrase, as referring to very unusual cases involving "far more than an injury to a single litigant."

Thus the courts have refused to invoke this concept in cases in which the wrong, if wrong there was, was only between the parties in the case and involved no direct assault on the integrity of the judicial process. Nondisclosure by a party or his attorney has not been enough.

The cases in which it has been found that there was, or might have been, a "fraud upon the court," for the most part, have been cases in which there was "the most egregious conduct involving a corruption of the judicial process itself." The concept clearly includes bribery of a judge or the employment of counsel in order to bring an improper influence on the court. (footnotes omitted).

There is no allegation of fraud or improper conduct on the part of Judge Steen. There was no attempt to corrupt Judge Steen through bribery or other improper influence. To characterize the alleged misrepresentations of defendants as fraud on the court would effectively

obliterate the distinction between fraud on the court and Rule 60(b)(3) fraud and would thereby eliminate the one year time limitation set forth in Rule 60(b)(3). Therefore, the Court finds defendants' alleged conduct, even if proven true, did not constitute fraud on the court for purposes of Rule 60(b).

3. Does plaintiff have a claim under Rule 60(b)(3)?

If plaintiff has a right to recover under Rule 60(b), he must do so under Rule 60(b)(3). As noted earlier, Rule 60(b)(3) allows a court to vacate a judgment for fraud if the motion is made within a reasonable time but not more than one year after the judgment or order was entered. The bankruptcy court issued its order on February 13, 1985. Plaintiff's second amended complaint seeking a rescission of the sale was not filed until November 6, 1987, some 33 months after final judgment. Because the amended complaint (which the Court will assume for purposes of argument to be a Rule 60(b) motion) may not relate back to the date of the original complaint, plaintiff has not timely filed his motion within the one year time limit. Even if the motion could relate back, the Court further finds the motion was not filed within a reasonable time. The one year limitation set forth in Rule 60(b) is the extreme limit which a court can allow for the filing of a 60(b)(3) motion. Thus, in *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 930 (5th Cir. 1976), the Fifth Circuit stated:

> Rule 60(b) states:
>
> > The motion shall be made within a reasonable time, and . . . not more than one year after the judgment, order, or proceeding was entered or taken.

> It makes no mention of the period for noticing appeal or of whether notice of appeal has been filed. Instead it sets up an outside time limit of one year, which plaintiffs in this case easily met, and prescribes a "reasonable time" standard which by its nature invites flexible application in varying situations. As Professors Wright and Miller state:
>
> > "What constitutes reasonable time must of necessity depend upon the facts in each individual case." The courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief and they consider whether the moving party had some good reason for his failure to take appropriate action sooner.
>
> 11 Wright & Miller, Federal Practice & Procedure § 2866, at 228-29 (footnote omitted).

The courts have also held that "a reasonable time" may conceivably be less than one year from the date the judgment was entered.[39]

Considering the facts in this case, the Court finds plaintiff's motion was not filed within a reasonable time for the following reasons. Plaintiff was suspicious of the transaction prior to the time the bankruptcy court approved the sale of his stock. Numerous depositions were taken in the bankruptcy court as well as the South Carolina litigation prior to the sale. Subsequent to the sale, fourteen depositions were taken and documents were subpoenaed from six non-party witnesses and from every

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[39] Kagan v. Caterpillar Tractor Co., 795 F.2d 601 (7th Cir. 1986); Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 648 (2d Cir. 1979).

defendant in this case. This information could also have been obtained prior to the sale of the stock. The bankruptcy court approved the trustee's request to have special counsel on February 14, 1985, and the Stone Pigman firm was hired on April 19, 1985. The bankruptcy court approved the Rule 2004 depositions on October 16, 1985. It is not clear why there was a delay of almost six months between the appointment of counsel and the Rule 2004 deposition request. The Court believes counsel had ample time to investigate this matter and to file a Rule 60(b)(3) motion earlier than the original date this suit was filed. The rights of numerous parties were prejudiced by plaintiff's failure to file this motion earlier, assuming the motion was filed at all. "Motions for relief from final judgment are addressed to the sound discretion of the district court, guided of course by accepted legal principles."[40] Exercising this broad authority and applying established legal principles, the Court finds plaintiff is not entitled to relief under Rule 60(b)(3).

C. Conclusion

The Court has considered the contentions of all of the parties whether discussed herein or not. For reasons set forth above, defendants' motion for summary judgment

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[40] A motion for relief from judgment provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances and the ruling of the trial court is set aside only upon a clear showing of abuse of discretion. Gulf Coast Fans v. Midwest Elec Importers, 740 F.2d 1499 (11th Cir. 1984); Hand v. United States, 441 F.2d 529, 531 (5th Cir. 1971).

is GRANTED. This suit shall be dismissed with prejudice at plaintiff's costs.

Judgment shall be entered accordingly.

Baton Rouge, Louisiana, January 24, 1989.

/s/ Frank J. Polozola
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-3102

RODNEY D. HENDRICK,

Plaintiff-Appellant,

versus

H. E. AVENT, ET AL., an unincorporated association,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Louisiana

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ON SUGGESTION FOR REHEARING EN BANC
(Opinion January 11, 5 Cir., 1990, ___ F.2d ___)

(FILED MAR 9 1990)

Before GARZA, WILLIAMS and DAVIS, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35, the suggestion for rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of

said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

CLERK'S NOTE
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF LOUISIANA

IN RE:	)	CASE NO.
	)	83-00787
RODNEY D. HENDRICK	)	
	)	A REORGANIZATION
DEBTOR	)	CASE
	)	(Filed Feb 13, 1985)
	)	

ORDER

THIS MATTER came up for hearing on Application by Donald F. Starns, Trustee, seeking authority to sell stock free and clear of all liens, claims, and encumbrances, including co-owner's rights, and to dismiss litigation.

CONSIDERING the Application, the record of this case, the evidence presented, the stipulation of counsel for Judith Polk Hendrick, good grounds appearing therefore, for reasons orally assigned;

IT IS HEREBY ORDERED that Donald P. Starns, Trustee, is hereby authorized to sell all of the estate's shares of stock in PFC, Inc., said sale to be free and clear of all liens, claims, and encumbrances, including any and all alleged co-owner's rights or right of first refusal of Judith Polk Hendrick.

IT IS FURTHER ORDERED that Donald P. Starns, Trustee, is hereby authorized to execute any and all documents in conjunction with the sale, to endorse and deliver the stock, to dismiss the cross-complaint referenced in the Application, and do any and all other matters in order to effectuate its intents and purposes of this Order.

ORDER ENTERED at Baton Rouge, Louisiana this 13th day of February, 1985.

ORDER SIGNED at Baton Rouge, Louisiana this 13th day of February, 1985.

/s/ _____
UNITED STATES BANKRUPTCY JUDGE

AGREED:

/s/ David S. Rubin
David S. Rubin
Attorney for Donald P. Starns, Trustee

/s/ Samuel L. Abide
Samuel L. Abide
Attorney for Judith Polk Hendrick

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
FEBRUARY 13, 1985
STEEN, J.

IN RE	:	CASE NO.
RODNEY D.	:	83-00787
HENDRICK	:	(Filed Feb 13, 1985)
DEBTOR	:	

The application of Donald P. Starns, the trustee herein, seeking authority to sell stock free and clear of all liens, claims, and encumbrances, including co-owner's rights, and to dismiss litigation came on for hearing this 13th day of February, 1985.

APPEARANCES:

Donald P. Starns,
Trustee

David S. Rubin,
Attorney for the Trustee

William E. Steffes,
Attorney for Debtor

Samera Abide,
Attorney for Judith Polk Hendrick

James A. Fink, Jr.,
Witness

Mr. Rubin introduced into evidence a copy of the original complaint filed by Francis Collins in South Carolina, together with the cross complaint. Mr. Rubin further introduced in evidence as Trustee Exhibit #2 the telegram offering to purchase the stock dated December 24, 1984.

The offerings were received in evidence and marked for identification as Trustee's Exhibit #1 and Trustee's Exhibit #2, respectively.

Mr. Steffes was heard in support of the objection of Rodney D. Hendrick to the proposed sale. Mr. Steffes called James A. Fink, Jr., as a witness and elicited his testimony. The testimony of the witness was further elicited by the Court and by Mr. Rubin.

Mr. Steffes called Donald P. Starns as a witness and elicited his testimony.

Ms. Abide, on behalf of Judith Polk Hendrick, waived the right of service and waived the right of first refusal to purchase the stock.

Considering the evidence presented and the arguments of counsel, the Court authorized the trustee to sell the estate's stock in PFC, Inc., free and clear of all liens and encumbrances, for the price of $150,000 cash. The Court directed the trustee to continue to look at the transaction and to bring an action to recover claims on behalf of the estate if any is found to exist.

STATE OF SOUTH CAROLINA COUNTY OF DARLINGTON	IN THE COURT OF COMMON PLEAS 83-CP-16-570
Francis A. Collins, Plaintiff, vs. PFC, Inc., James A. Fink, Jr., Herbert L. Polk, Rodney Hendrick, and Donald P. Starnes as Trustee Bankruptcy for Rodney Hendrick, Defendants.	ORDER OF DISMISSAL

WHEREAS, Francis A. Collins, the Plaintiff in the above entitled action, filed the above action seeking damages alleged to have resulted from the issuance by PFC, Inc., to the Defendants Fink, Polk and Hendrick of 3000 shares of stock on July 9, 1981, and

WHEREAS, the Plaintiff has received an offer for settlement which he has accepted, which settlement is to the satisfaction of the Plaintiff,

NOW, THEREFORE, the Plaintiff herewith desires to dismiss his pending suit as referenced hereinabove against all Defendants in consideration of the settlement which has been accepted by the Plaintiff.

Based, therefore, upon the case having been settled to the satisfaction of the Plaintiff and based upon the Plaintiff's desire to dismiss this pending lawsuit against all Defendants,

IT IS, THEREFORE, ORDERED that the Complaint of the Plaintiff as referenced hereinabove is herewith dismissed as to all Defendants with prejudice, cross-complaint still pending.

IT IS SO ORDERED:

/s/ _____
Presiding Judge, Court of
Common Pleas Fourth
Judicial Circuit

/s/ _____
December 22, 1984.

WE CONSENT:

Paulling & James

By /s/ _____
SALEEBY, COX & BLEDSOE, P.A.

By /s/ _____
Attorneys for Francis A. Collins
LINDSAY AND LINDSAY

By /s/ _____
HAMMER AND BERNSTEIN

By /s/ _____
Attorneys for PFC, Inc., James A.
Fink, Jr. and Herbert L. Polk

GREER & MILLING
BY: _____
Attorneys for Rodney Hendrick
and Donald P, Starnes
as Trustee in Bankruptcy for
Rodney Hendrick

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF LOUISIANA

IN RE:	)	CASE NO.
	)	83-00787
RODNEY D. HENDRICK	)	A REORGANIZATION
	)	CASE
DEBTOR	)	(Filed May 24, 1985)
	)	
	)	

ORDER APPROVING EMPLOYMENT OF SPECIAL COUNSEL BY TRUSTEE

THIS MATTER came up for hearing on motion of Donald P. Starns, Trustee, seeking approval of the Application for Employment of Special Counsel (the "Application"). Present in Court: David S. Rubin, Attorney for Donald P. Starns, Trustee; William E. Steffes, Attorney for Rodney D. Hendrick, Debtor; John C. Anderson and Samera L. Abide, Attorneys for Polk Chevrolet, Inc. and Judith Polk.

CONSIDERING the application, the stipulations of counsel, the arguments of counsel, the testimony presented, and the entire record in this matter,

IT IS HEREBY ORDERED AS FOLLOWS:

1. The Trustee is hereby authorized to employ the law firm of Stone, Pigman, Walther, Wittmann & Hutchinson to represent the Trustee as Special Counsel in the matters set forth in the Application.

2. Said employment shall be under a general retainer, with all fees payable to said attorneys to be subject to the approval of this Court in accordance with applicable provisions of law; and further that compensation shall

be payable as follows: hourly compensation (after Court approval) at the rate of $225.00 per hour for senior partner, $165.00 per hour for partner, $100.00 per hour for senior associate, $85.00 per hour for associate, and $40.00 per hour for paralegal.

3. The Trustee is authorized to expend a total sum of $25,000.00 maximum on either attorneys fees and costs to the aforementioned Special Counsel or on other investigative expenses concerning these matters. The Trustee shall report to the Court after having determined more completely the probability of success and potential recovery in these matters. If the Trustee is able to obtain enough information to justify a complete or final decision without the expenditure of the full sum of $25,000.00 that is authorized herein, then he shall do so. The Trustee shall file a motion for a final determination as to whether to proceed with the contemplated litigation once that determination has been made by the Trustee. The Trustee is also directed that if in the course of his investigation he can reasonably liquidate sufficient assets to pay all claims in this case in full, including administrative and priority claims, then the Trustee shall do so and shall distribute or abandon the cause of causes of action contemplated in the Application to Mr. Hendrick and Ms. Polk for their decision whether or not to proceed to assert such action or actions.

ORDER ENTERED at Baton Rouge, Louisiana, April 29, 1985.

ORDER SIGNED at Baton Rouge, Louisiana, this 24th day of May, 1985.

/s/
UNITED STATES
BANKRUPTCY JUDGE

CHAPTER 96 – RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

§ 1961. Definitions

As used in this chapter

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections

2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

* * *

§ 1964. Civil remedies

(a) The district courts of United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take

such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.